Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

October Term, 2003

Edward Kennedy and Catherine Singer, Petitioner,

v.

Richard Hughes, Walter Dasheno, Edwin Tafoya, Dale Baca, Charles Suazo, Joseph Val Gutierrez, C. Anthony Suazo, Jose N. Chavarria, John Shije, Francis Tafoya, Alvin Warren, Denny Gutierrez, and George Gutierrez, Respondents.

On Petition for a Writ of Certiorari to the
Unites States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The question presented is whether the decision in the Tenth Circuit set a precedent which allows Tribes to single-out and violate nonmembers constitutional rights.

Another question presented is whether the district court incorrectly interpreted this Court's rule regarding the requirement to exhaust remedies.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEAL FOR THE TENTH CIRCUIT

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The district court's opinion, (per Johnson, D.J.) granting respondent's motion to dismiss (Appendix ("Pet. App.") 1a-2a) Memorandum opinion. The court of appeals' opinion (per Baldock J., McConnell, J., Lucero, C.J.) is published at 60 F. Appx. 734.

STATEMENT OF JURISDICTION

The court of appeals entered its order March 19, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The provisions of the Indian Civil Rights Act of 1968, 25 U.S.C. §1302 et seq., relevant to this petition are printed in the Appendix at 13a-14a.

STATEMENT OF THE CASE

Petitioner filed a civil complaint to contest the Santa Clara tribe's regulatory authority over him. Because he had been found in contempt by Respondents tribal court and incarcerated for 33 days due to his failure to pay two civil judgments totaling $15,000 within ten days. Later held by this Court "central to this aspect of the case's out holding in *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997); "As to nonmembers . . . a tribes adjudicatory jurisdiction does not exceed its legislative jurisdiction . . .". That formulation leaves open the question whether a tribe's adjudication over nonmember defendants equals its legislative jurisdiction. *Nevada v. Hicks*, 533 U.S. 353 (2001). "Where nonmembers are concerned the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Oliphant v. Squamish Tribe*, 435 U.S. 191 (1978).

REASONS FOR GRANTING THE WRIT

Several compelling reasons exist for this Court to grant a writ of certiorari in this case. First, the Tenth Circuit's judgment to refuse to find jurisdiction in the Petitioner's

claim sets a precedent to allow Indian tribes to single-out for punishment and violate a nonmember's constitutional rights. Also, the Tenth Circuit's decision allows a tribe's contracted independent legal counsel to conspire with such tribes to create bills of attainder and other tribal legislation. These acts by Respondent eliminated previously surrendered sovereign immunity in the tribal court in order to avoid suit. Such a decision also allows tribal counsel to hide behind a bad faith creation of sovereign immunity after counsel has instigated such action.

Second, the Tenth Circuit's judgment ignores the rules created in this Court's opinions over the years on the requirement of exhaustion of remedies. To allow the Tenth Circuit's judgment to stand would defy any notion of justice and fairness in the American judicial system due to the acts of both the Santa Clara Tribe and their contracted independent legal counsel to systematically eliminate any remedy the Petitioner should have to address the harm done to him by the Respondents. The Santa Clara Tribe and their counsel have acted to personally harm the Petitioner and to use any means to avoid responsibility for their actions and the actions of their agents.

I. The Decision Below Sets A Precedent Which This Court Should Immediately Respond To Because It Allows Tribes To Single-Out And Violate Nonmembers Constitutional Rights.

The most significant portion of the record below, which was not thoroughly considered by the Tenth Circuit is that the Santa Clara Tribe had waived their defense of sovereign immunity by tribal law. The record below reflects that once the Tribe learned, through their tribal counsel, that they could "win their case" against Petitioner's case by enacting a new tribal law, they immediately did so. Another important fact illustrated by the record is that the Petitioner was actually successful in his appeal to the Santa Clara Appellate

Court. The Tribe then, again with the advice of counsel, acted to limit the Petitioner by abolishing the appellate court and conceal the decision in favor of the Petitioner.

The Tenth Circuit court held that no jurisdiction existed over Petitioner's claim under the rule established in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Tenth Circuit failed to recognize that the rule in *Santa Clara* does not apply to this case because Petitioner is not a member of the Santa Clara Indian tribe but resides on the reservation. Petitioner is for all intent and purposes considered an "Indian" under the ICRA as a member of the Blackfeet Indian Tribe, but as a non-member residing the Santa Clara Pueblo, his access to remedies is significantly limited. This is an important distinguishing factor between this case and *Santa Clara*. In *Santa Clara*, the matter before this Court was one not only of an internal tribal nature but all parties to the suit were members of the Santa Clara Indian tribe. This Court found that all had access to such remedies to the tribe's elected officials and courts. Petitioner, as a resident of Santa Clara Pueblo, has some access to the tribal courts, but outside of this limited resource, petitioner has no other access to the governing body of Santa Clara Pueblo as a member of the tribe would have.

Another distinguishing factor in this case is that the matter before the court does not relate to those subjects which both the Supreme Court and the U.S. Congress have ruled to be exclusively governed by Indian tribes. More specifically, this Court has, since the late 1970's, given significant clarification to the kind of civil jurisdiction tribal courts can exercise. This Court beginning with *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), discussed the differences between members of Indian tribes who reside on the reservation and those who are non-member residents. This Court stated, "nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the

governing tribes. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation." *Id.* at 161. This Court found that in most instances non-member Indians saw a lack of access to the governing body of the reservation in which they reside. For these reasons non-members receive different considerations by courts which preside over actions by them against Tribal courts and officials.

This principle persists and has been used in the courts regarding claims where a nonmember Indian in a civil action is concerned. In *Kaul v. Stephan*, 83 F.3d 1208, (10th Cir. 1996), the Tenth Circuit stated, "The Supreme Court has recognized a distinction between Indians and nonmember Indians in several contexts, and has for most practical purposes treated non-member Indians in the same manner as non-Indians." *Id.* at 1218. This principal has also been recognized in other jurisdictions. The court in the District of South Dakota stated: "In civil cases arising from Indian reservations, non-member Indians, already residing on a reservation, are treated as non-Indians as to the affairs of that reservation." *Christian Children's Fund Inc. v. Crow Creek Sioux Tribal Court*, 103 F.2d 1161, 1165 (D.S.D. 2000).

A more illustrative and binding precedent exists in this Court's opinion in *Nevada v. Hicks*, which gives great detail to the differences regarding non-members residing on another tribe's reservation as well as synthesizing other important cases involving this principle from *U.S. v. Montana*, 450 U.S. 544 (1981), *U.S. v. Oliphant*, *Strate v. A-1 Contractors*, and *National Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985). In *Hicks*, this Court stated as a general rule regarding non-members that, "Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in *Montana v. United States*...". *Hicks* at 2309. This Court went on to state, "Where nonmembers are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependant status of the tribes, and so

cannot survive without express congressional delegation'." *Id.* at 2309-2310.

As to the exercise of tribal authority over petitioner, such an exercise of power by the tribe does not serve to protect its' interests of self-government. As this Court, also, stated in *Hicks*, "Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction." *Id.* at 2314. This Court also recited the list of the matters for which the tribe has a greater interest so that its use of inherent sovereignty would be logically served. Those instances are as stated by the Court, "First, a tribe may 'regulate ... the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements And second. A tribe may regulate nonmember conduct that 'threatens or has some direct effect on the political integrity, the economic security, or health or welfare of the tribe.' But unless one of these exceptions applies. The 'general proposition' governs and the tribe's civil jurisdiction does 'not extend to the activities of nonmembers of the tribe.'." *Hicks,* concurrence by Justice Souter at 2320-2321.

These illustrations by the Court give guidance to courts considering actions taken against uses of tribal authority. In this case, this Court should recognize that Santa Clara's action regarding the Petitioner in no way relate to those principles of necessary tribal authority. The claims by the petitioner in this case, also, do not relate to contractual or business relations with Santa Clara. Nor do they relate, as stated previously, to an internal matter normally left to the authority of the governing body of the tribe.

II. The District Court incorrectly interpreted this Court's rule regarding the requirement to exhaust remedies.

The Tenth Circuit held that Petitioner had not exhausted his remedies as regarding other courts and, therefore, it had no jurisdiction to hear the claims. This doctrine was established by this Court in, *National Farmers Union*, to allow the tribal courts to deal with matters pertaining to it, authority over certain claims. But in this case the Petitioner its effect only helps to eliminate our claims against the Respondents. In an examination of Chief Judge Norman Singer's declaration of the Santa Clara Court of Appeals, several statements allude to the elimination of one remedy, the Santa Clara Court of Appeals, to the Petitioner after a ruling by it in favor of the Petitioner for remand to its tribal court against the Respondents. In the *Hicks* opinion, this Court addressed the consideration of exhaustion. Normally the Court would allow for certain claims which align themselves to *National Farmers*, but this Court also stated, "In *National Farmers Union* we recognized exceptions to the exhaustion requirement, where 'an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, … or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction…'." *Hicks* at 2315. Not only have the respondents attempted to eliminated remedies to the petitioner they have also acted with prejudice against his claims to eliminate them completely. As shown by a declaration by former Pro Tem Judge for Santa Clara Christopher Harrington, Santa Clara has continually and intentionally made attempts to delay this action against them. These attempts to delay led to the resignation of Judge Harrington.

That is what this Court in *Hicks* found to be most troublesome. As this Court stated. "…we added a broader

exception in Strate: '[w]hen ... it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule,' so the exhaustion requirement 'would serve no purpose other than delay." *Id.* at 2315. The Santa Clara court did delay the actions put forth by the Petitioner in an attempt to circumvent the appellate decision against them in their Santa Clara Court of Appeals.

Chief Judge Singer asserted the decision and remand against Santa Clara tribal officials were later disregarded by Santa Clara tribal officials despite the Santa Clara Appellate Court's remand for trial of Petitioner's claims. He also corroborated Judge Harrington's statements regarding intentional delay by Santa Clara officials. Judge Singer asserted that, actions taken by the Santa Clara Tribal Council Respondent Richard Hughes' advice and counsel was to ignore Petitioner's claims. Judge Singer statements establish that the Santa Clara Tribal Council, with its attorney's advice, first attempted to eliminate the tribe's waiver of sovereign immunity which existed when Petitioner filed his claim against Santa Clara. Judge Singer asserts that following attempts to delay or eliminate Petitioner's claims the Santa Clara Pueblo Council eliminate the tribe's Court of Appeals which, rendered the opinion against them remanding Petitioner's claims for trial. Not only have the issues of a lack of access which concerned this Court in past opinions occurred here, but there is an actual attempt by the Respondent's to eliminate any recourse for the Petitioner through the use of governmental and legislative action.

The declarations of Judge Harrington and Signer illustrate that not only does the petitioner lack in the normal remedies of a tribal member but that those remedies have been systematically prejudiced or eliminated by the Respondents. As illustrated in *Hicks*, when a tribe acts in a manner of delay or bad faith Petitioner should be granted some means in which to remedy his claim.

CONCLUSION

The petition for a writ for certiorari should be granted.

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

EDWARD KENNEDY et at,

Plaintiffs,

v.

RICHARD HUGHES et at,

Defendants.

CIVIL NO. 01-1183 WJ/LFG

JUDGMENT AND ORDER OF DISMISSAL

THIS MATTER came before the Court upon Defendant Richard Hughes' Motion to Dismiss Complaint [Docket No.25] and a Motion to Dismiss Complaint [Docket No.5] filed by Defendants Dasheno, E. Tafoya, Baca, C. Suazo, J. Gutierrez, A. Suazo, Chavarria, Shije, F. Tafoya, Warren, D. Gutierrez, and G. Gutierrez (the "Tribal Defendants"). Pursuant to the findings and conclusions set forth in the Memorandum Opinion and Order which accompanies this Rule 58 Judgment.

IT IS THEREFORE ORDERED and ADJUDGED that Defendant Richard Hughes' Motion to Dismiss Complaint [Docket No.25] and the Tribal Defendants' Motion to Dismiss Complaint [Docket No.5] are GRANTED and Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

s/ William Johnson

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

EDWARD KENNEDY et al.,

Plaintiffs,

v.

RICHARD HUGHES et at,

Defendants.

No. CIV 01-1183 WI/LFG

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court pursuant to Defendant Richard Hughes' Motion to Dismiss Complaint [Docket No.25] and a Motion to Dismiss Complaint [Docket No.5] filed by Defendants Dasheno, E. Tafoya. Baca, C. Suazo, J. Gutierrez, A. Suazo, Chavarria, Shije, F. Tafoya, Warren, D. Gutierrez, and G. Gutierrez (the "Tribal Defendants").

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Plaintiffs filed a Complaint in this Court on October 12, 2001. Plaintiff Kennedy is a resident at Santa Clara Pueblo, an enrolled member of the Blackfeet Indian Tribe, and married to Plaintiff Singer. Plaintiff Singer is a resident of the Santa Clara Pueblo and an enrolled member of the Santa Clara Indian Pueblo. The "Tribal Defendants" are all enrolled members of the Santa Clara Indian Pueblo and officials of the Pueblo. These persons are sued in their

individual capacities. Defendant Hughes is an attorney who provided legal services to the Tribal Defendants. Hughes is a non-Indian and does not reside at the Santa Clara Pueblo. Plaintiffs' Complaint alleges federal question jurisdiction under 28 U.S.C. § 1331 pursuant to the Indian Civil Rights Act of 1968 (ICRA). 25 U.S.C. §§ 1302 et seq. Plaintiffs essentially allege that the Hughes and the Tribal Defendants violated their rights under the ICRA by drafting and adopting a tribal resolution that retroactively reinstated tribal sovereign immunity in tribal court while Plaintiffs had a claim against the tribe pending in tribal court.

DISCUSSION

Defendant Hughes and the Tribal Defendants argue that this Court lacks jurisdiction over Plaintiffs claims, or alternatively, Plaintiffs have failed to state a claim upon which relief can be granted because the ICRA does not create a private cause of action on which a party may bring a civil action such as Plaintiffs' complaint. Defendant Hughes and the Tribal Defendants also urge that Plaintiffs' claims should be dismissed based on legislative immunity, failure of Plaintiffs to exhaust tribal remedies, and res judicata. Defendant Hughes additionally argues that Plaintiffs' claims should be dismissed because the tribal resolution at issue in this case did not violate any of Plaintiffs' rights as it was not a bill of attainder and did not deprive Plaintiffs of liberty or property. Defendant Hughes further asserts that there was no conspiracy between Hughes and Tribal Defendants. Finally, Defendant Hughes urges this Court to find that Tribal Defendants and Hughes are entitled to qualified immunity.

This Court finds that it does not have jurisdiction over Plaintiffs' claims, or, alternatively, that Plaintiffs fail to state claims upon which relief can be granted because the ICRA does not authorize a cause of action such as Plaintiffs'. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Thus, this Court need not address and will not decide the other issues

raised by Defendants, many of which appear to be issues of first impression in the Tenth Circuit. The Court commends Defendants for their briefs on these other issues, and while tempted to engage in an academic discussion of the application of legislative immunity, res judicata, and qualified immunity to this case, the Court will save these issues for another day and another case. The ICRA provides that "No Indian tribe in exercising its powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. . .." 25 U.S.C. § 1302. As the Supreme Court noted in Martinez, the only express remedial provision found within the ICRA is Section 1303 which extends the writ of habeas corpus in federal court to test the legality of a person's detention by order of an Indian tribe. 436 U.S. at 58. The Court in Martinez held that, in passing the ICRA, Congress did not intend to create a federal forum for issues arising under Section 1302 of the ICRA and that the failure to provide a remedy other than habeas corpus was a deliberate one. Id. at 59-60. Thus, in accordance with Martinez, a plaintiff alleging a violation under the ICRA does not state a claim upon which relief can be granted unless plaintiff is in court by writ of habeas corpus. Additionally, courts have found that federal question jurisdiction does not lie for a claim under the ICRA except by writ of habeas corpus. See Olguin v Lucero, 87 F.3d 401 (10th Cir. 1996).

Plaintiffs urge this Court to allow their ICRA claim to proceed in federal court under the exception to Martinez found in Dry Creek Lodge. Inc. v Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980). The "absolute necessity" exception found in Dry Creek Lodge is narrowly construed. White v Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984). In order to qualify for the Dry Creek exception, a plaintiff must demonstrate that the dispute involves a non-Indian party, that a tribal forum is not available, and that the dispute involves an issue falling outside internal tribal

affairs. Ordinance 59 Ass'n v United States Dep't. of the Interior Secretary, 163 F.3d 1150,1156 (l0th Cir. 1998).

Plaintiffs contend that Plaintiff Kennedy is a non-Indian party to this dispute. The Court recognizes that Plaintiff Kennedy is not a member of the Santa Clara Pueblo, but is an enrolled member of the Blackfeet Indian Tribe. Dry Creek and its progeny have not clarified whether a non-member Indian would qualify as a non-Indian for purposes of the Dry Creek exception. This Court, however, need not delve into this delicate matter because Plaintiffs have failed to show that they would be entitled to the exception if Kennedy was found to be a non-Indian.

Plaintiffs have failed to show that a tribal forum is not available to address their dispute. Plaintiffs state that a tribal forum is effectively and practically unavailable because the tribal forum has been dilatory in addressing Plaintiffs' various causes of action, and because the tribal government disbanded its appellate court system and adopted an intertribal appellate forum during the pendency of Plaintiffs' appeal from the tribal court decision on their case. Complaint ¶¶ 77, 78, 97, 98, 101. Plaintiffs are required to show that a tribal forum is actually unavailable; allegations of futility are insufficient. See White v. San Juan Pueblo, 728 F.2d 1307,1313 (10th Cir. 1984); Jimi Development Corp. v. Ute Mountain Ute Indian Tribe, 930 F.Supp. 493 (D. Colo. 1996). Because Plaintiffs admit in their pleadings that their various cases are still pending before the tribal fora, they have failed to show that no tribal forum is available.

Plaintiffs also fail to show that their dispute involves issues falling outside internal tribal affairs. Plaintiffs' dispute involves the tnbal council's decision regarding tribal sovereignty in a civil rights suit in tribal court, and the tribal council's decision regarding the tribal court structure. Complaint ¶¶ 85, 98, 108 -115, 117- 121, 123, 124, 125, 126. These issues are plainly internal tribal affairs and are at the very heart of tribal self-governance and self-detennination. Thus, Plaintiffs have failed to show that the Dry Creek

exception applies in this case. Accordingly, Defendants are entitled to a dismissal of all claims with prejudice because Plaintiffs have failed to state a claim upon which relief can be granted or, alternatively, this Court lacks subject matter jurisdiction to hear Plaintiff's claims.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant Richard Hughes' Motion to Dismiss Complaint [Docket No.25] and the Tribal Defendants' Motion to Dismiss Complaint [Docket No.5] are GRANTED and Plaintiff's Complaint is DISMISSED with prejudice in its entirety.

s/ William Johnson

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDWARD KENNEDY, et al.,

Plaintiffs,

v.

RICHARD HUGHES, et al,

Defendants.

CIVIL NO. 02-2112

ORDER AND JUDGMENT

Plaintiffs, members of two different Indian tribes, filed suit in federal district court against several officials of the Santa Clara Pueblo Tribe, claiming violations of their civil and constitutional rights as protected by the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301 et seq. Concluding that ICRA does not authorize plaintiffs' suit, the district court dismissed the action. *Kennedy v. Hughes,* No. CIV 01-1183 WJ/LFG, slip op. at 5 (D.N.M. Mar. 27, 2002). In order to resolve the issue presented, we reassess the extent to which Congress created a private cause of action under ICRA. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I

Edward Kennedy, a member of the Blackfeet Indian Tribe, and his wife Catherine A. Singer, a member of the Santa Clara Pueblo (collectively, "plaintiffs"), both reside on the

Santa Clara Pueblo reservation. In 1996, plaintiffs filed a suit in the Santa Clara Tribal Court against Chief Judge Silva of that court and fourteen Santa Clara Tribal Council ("Council") members, claiming that their civil rights were violated when Chief Judge Silva incarcerated Kennedy and seized property belonging to Singer. Richard Hughes was retained by the Council to defend this suit. On September 11, 1997, Santa Clara Tribal Court Judge H. Paul Tsosie granted defendants' motion to dismiss the complaint. Plaintiffs then appealed to the Santa Clara Pueblo Tribal Court of Appeals, which reversed the tribal court's dismissal in 1998 and remanded for further proceedings.

Central to the tribal appeal of plaintiffs' Tribal Court suit against Silva and the Tribal Council members was whether a waiver of the tribe's sovereign immunity for purposes of civil rights actions continued to be in effect. In 1981, the Council had enacted a Law and Order Code ("Code") that contained a waiver of immunity for civil rights actions. In December 1983, the Council repealed this waiver by resolution, reaffirming its immunity from suit and that of its members, officers, employees, and staff. In March 1985, however, the Council reenacted the 1981 Code, but, according to the Council, the reenactment was "subject to all intervening changes, including the repeal of [the waiver provision]." (Appellant's App. at 75.) Nonetheless, Hughes advised the Council following the remand of plaintiffs' suit that the status of the waiver was uncertain, and suggested a proposed resolution reaffirming the tribe's sovereign immunity in civil rights cases. This resolution was passed in November 1998 as Resolution No. 98-29. Following the enactment of this resolution, the plaintiffs filed a new action in the Santa Clara Tribal Court against Hughes and all the members of the Council who had voted to adopt Resolution No. 98-29. In this action, the plaintiffs claimed that Resolution No. 98-29 violated their rights under the Santa Clara Pueblo Constitution and their rights under the U.S. Constitution as protected by ICRA. Judge Frank DeMolli, appointed as

Tribal Judge pro tempore, granted defendants' motion to dismiss. Plaintiffs did not appeal this order.

In October 2001, plaintiffs filed the present suit in federal district court against several tribal officials (collectively "Tribal Defendants") and Hughes. In this action, plaintiffs claimed that the Tribal Defendants and Hughes had violated their constitutional rights as protected by ICRA, 25 U.S.C. § 1302 ("No Indian tribe in exercising powers of self-government shall ... deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."). Specifically, plaintiffs made the same argument they had raised in their second suit in tribal court, claiming that the enactment of Regulation No. 98-29 violated the Santa Clara Pueblo Constitution, the United States Constitution, and § 1302 of ICRA, insofar as it denied them due process and equal protection of the law. Plaintiffs sought compensatory and punitive damages as well as declaratory relief. Hughes and the Tribal Defendants filed separate motions to dismiss, arguing, among other grounds, that § 1302 of ICRA does not create a cause of action for this claim in federal court. The district court dismissed the action pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim or, in the alternative, for lack of subject matter jurisdiction. *Kennedy v. Hughes,* slip op. at 5. Plaintiffs appeal this decision.

II

A dismissal for lack of subject matter jurisdiction is reviewed de novo. *U.S. West, Inc. v. Tristani,* 182 F.3d 1202, 1206 (10th Cir.1999). In reviewing a dismissal for failure to state a claim under Rule 12(b)(6), we accept all well-pleaded factual allegations in the complaint as true and view them in the light most favorable to the nonmoving party. *Sutton v. Utah State Sch. for the Deaf & Blind,* 173 F.3d 1226, 1236 (10th Cir.1999). The legal sufficiency of a complaint is a question of law; therefore, a Rule 12(b)(6) dismissal is

reviewed de novo. *Id.* Because plaintiffs' federal suit in the instant case is based on § 1302 of ICRA, we consider as a threshold matter whether a private cause of action may be brought under that section. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 69, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), the Supreme Court held that the only provision of ICRA that authorizes a private cause of action is § 1303, the habeas corpus provision. The Court held that § 1302, the section under which plaintiffs bring the instant action, "does not impliedly authorize actions for declaratory or injunctive relief against either [a] tribe or its officers." *Id.* at 72. We recognized a limited exception to this rule in the case of *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir.1980), and plaintiffs claim that their action falls under the *Dry Creek* exception to *Santa Clara.* In *Dry Creek,* the plaintiffs were non-Indians involved in a land dispute with two Indian tribes. *Id.* at 683-84. Although we acknowledged *Santa Clara* as governing authority, we nonetheless noted that the *Dry Creek* plaintiffs had "no remedy within the tribal machinery nor with the tribal officials in whose election they cannot participate." *Id.* at 685. We accordingly distinguished *Santa Clara* on the grounds that *Santa Clara* involved "entirely an internal matter concerning tribal members" and that "[t]he members of the Tribe who were seeking relief also had access to their own elected officials and their tribal machinery to settle the problem." *Id.* We have held that our holding in *Dry Creek* must be interpreted narrowly to avoid conflict with the Supreme Court's decision in *Santa Clara. White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir.1984). In order for the *Dry Creek* exception to apply, "[a] plaintiff must demonstrate: the dispute involves a non-Indian party; a tribal forum is not available; and the dispute involves an issue falling outside internal tribal affairs." *Ordinance 59 Ass'n v. U.S. Dep't of the Interior Sec'y*, 163 F.3d 1150, 1156 (10th Cir.1998).

In the instant case, the district court concluded that plaintiffs

had failed to satisfy the second two requirements for the *Dry Creek* exception to apply. *Kennedy v. Hughes,* slip op. at 4-5. As to the existence of a tribal forum, the district court concluded that a tribal forum is available in this case, as plaintiffs have filed two actions before the Santa Clara Tribal Court, the second of which involved the same claim as in the instant federal case.

In this Court, plaintiffs assert that they "have demonstrated that no tribal forum is viable to hear and decide their claims." (Appellants' Br. at 9.) According to plaintiffs, "[a] pro tem judge appointed by the Tribal Defendants determined that Appellants' second complaint should be dismissed because the Santa Clara Tribal Defendants' actions were not subject to judicial review." (*Id.* at 6.) This misrepresents the tribal court's decision. Judge Frank Demolli, appointed to hear plaintiffs' case in tribal court, expressly ruled that the court had "both subject matter and personal jurisdiction" over the case (Appellants' App. at 101), and rejected plaintiffs' claims on the merits under ICRA as well as the Constitution and Bylaws of the Santa Clara Pueblo. In an extensive written opinion relying on both federal and tribal court precedent, Judge Demolli held that Santa Clara Pueblo tribal courts are available as forums for adjudication of civil rights claims under ICRA and other law, and that "[a]ny civil rights claim shall be reviewed using the background of tribal sovereignty and in the context of the Pueblo of Santa Clara's unique tribal law and custom." (*Id.* at 106.) Judge Demolli then proceeded to explain why plaintiffs' claims of due process, equal protection, and bill of attainder violations were deficient on the merits to state a claim on which relief may be granted. Plaintiffs did not appeal.

The *Dry Creek* exception thus plainly does not apply. In *Dry Creek,* there was "no forum where the dispute can be resolved and the personal and property rights asserted by plaintiffs be considered." 623 F.2d at 684. Here, by contrast, the Santa Clara Pueblo has made its tribal courts available

for vindication of such rights. This is precisely as contemplated by the Supreme Court: "Tribal forums are available to vindicate rights created by the ICRA.... Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 65. Plaintiffs have taken advantage of that forum, not once but twice. They did not prevail on the merits, but that does not entitle them to take their claim to federal court.

In light of the availability of a tribal forum, we need not consider whether plaintiffs' case satisfies any of the other elements of the *Dry Creek* exception. Because *Santa Clara* holds that there is no private cause of action under ICRA outside the habeas context and plaintiffs fall under no exception to this rule, the district court correctly dismissed this suit for lack of subject matter jurisdiction or failure to state a claim upon which relief may be granted.

III

The judgment of the district court is **AFFIRMED.**

s/ Carlos F. Lucero

CIRCUIT JUDGE

§ 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall--

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(2)

Supreme Court, U.S.
FILED
JUL 24 2003
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No. 02-1853

In the Supreme Court of the United States

EDWARD KENNEDY AND CATHERINE SINGER,
Petitioners,

v.

RICHARD HUGHES, WALTER DASHENO, EDWIN TAFOYA, DALE BACA, CHARLES SUAZO, JOSEPH VAL GUTIERREZ, C. ANTHONY SUAZO, JOSE N. CHAVARRIA, JOHN SHIJE, FRANCIS TAFOYA, ALVIN WARREN, DENNY GUTIERREZ AND GEORGE GUTIERREZ,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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The order and judgment of the court of appeals (Pet. App. 7a–13a) is not reported. A complete copy of this order and judgment (including the footnotes omitted from the version provided by Petitioners) is included in Respondent's Appendix ("Resp. App.") at 25a-33a. This unreported order and judgment can also be found at 60 F. Appx. 734.

The district court's memorandum opinion (Pet. App. 2a-6a) is not reported. A complete copy of this memorandum opinion (including the footnotes omitted from the version provided by Petitioners) is attached at Resp. App. 19a-24a.

STATEMENT OF JURISDICTION

The court of appeals issued its order and judgment on March 20, 2003 (Resp. App. 25a) (not March 19, 2003, as stated in the Petition at 2). This Court's jurisdiction was invoked by Petitioners pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondents submit that the Statement of the Case in the Petition is incomplete and confusing, and contains misstatements as to the nature of this proceeding. For example, the opening sentence in the Statement of the Case in the Petition, that "Petitioner filed a civil complaint to contest the Santa Clara tribe's regulatory authority over him," (Pet. 2) is untrue, as is the implication contained in the next fragmentary sentence, that the case presented to this Court arose from Petitioner Kennedy's incarceration for contempt of court. As will be explained below, this case arose from a suit for damages filed by Petitioners claiming Petitioner Kennedy was injured by the Pueblo of Santa Clara Tribal Council's

enactment of a resolution reaffirming the Pueblo's sovereign immunity from unconsented suit. A complete and accurate account of the somewhat convoluted circumstances leading to the filing of the Petition follows.

1. Proceedings in the Santa Clara Pueblo Tribal Court

In 1993, Petitioner Edward Kennedy ("Kennedy"), a member of the Blackfeet Indian Tribe and long-time resident of the Santa Clara Pueblo married to Santa Clara Pueblo member and Petitioner Catherine Singer ("Singer"), was sued by two creditors in the Santa Clara Pueblo Tribal Court. None of Respondents herein were parties to those lawsuits. After Kennedy failed to pay the money judgments awarded the creditors, he was held in contempt of court and was incarcerated by order of Santa Clara Tribal Court Judge Dennis Silva for 33 days. (Pet. 2). Kennedy never appealed either judgment, or challenged the Santa Clara Tribal Court's jurisdiction in either proceeding, nor did he ever seek habeas corpus relief under 25 U.S.C. § 1303 of the Indian Civil Rights Act ("ICRA") to challenge the validity of his incarceration.

Instead, three years later, in August, 1996, Kennedy and Singer filed a suit for money damages in the Santa Clara Tribal Court against Judge Silva, styled *Kennedy, et al. v. Silva,* No. CV 96-436, alleging that Judge Silva had violated Kennedy's civil rights. (Resp. App. 26a). Judge Silva, represented by Respondent Hughes (who has been general counsel to the Pueblo since October, 1995), filed a motion to dismiss the complaint, asserting judicial immunity and failure to state a claim on which relief could be granted. The motion was heard by Tribal Judge Paul Tsosie, who, after full briefing and argument, dismissed the complaint in September,

1997. Kennedy appealed the dismissal to the Santa Clara Court of Appeals. (Resp. App. 26a-27a). That court vacated the order of dismissal and remanded the case for further proceedings in January, 1998, and it directed that the case be heard by a judge specially appointed by the Tribal Council. In the meantime, Kennedy filed a second amended complaint, in which he added as additional defendants the Pueblo Governor, Lieutenant Governor and all of the members of the 1994 Tribal Council, alleging wrongful failure to supervise Judge Silva as the claimed basis for their liability. (Resp. App. 3a, 26a).

Respondent Hughes had advised Pueblo Governor Walter Dasheno that in the course of working on the *Kennedy* case he had discovered that there was uncertainty from the documentation as to whether or not the Pueblo had or had not waived its sovereign immunity from suits asserting violations of civil rights. The problem arose from the fact that in 1981, the Tribal Council had enacted a comprehensive Law and Order Code, that included Section 60.4, which expressly waived the immunity of the Pueblo's "members, officers, employees and staff from suit in matters relating to alleged violation of civil rights." Two years later, however, by Resolution enacted on December 7, 1983, the Tribal Council repealed Section 60.4. Then, in 1985, it was discovered that the Code had not been submitted to the Bureau of Indian Affairs for approval, as required by the Santa Clara constitution. The Council therefore reenacted the Code, by Resolution No. 3-07-85, and the Bureau approved it. The question identified by Respondent Hughes was whether the reenactment and approval of the Code incorporated the repeal of Section 60.4. To clarify the situation, Governor Dasheno requested that Respondent Hughes prepare and present to the Tribal Council a resolution addressing the issue, which the Council enacted on November 10, 1998, as Resolution No.

98-29 (Resp. App. 27a-28a). That resolution confirmed the Council's original legislative intent that the 1983 repeal of Section 60.4 had been incorporated into the reenactment of the Code in 1985 (and further declared that the doctrine of judicial immunity was implicitly adopted by the Council when it created a tribal judiciary by its enactment of the Code). (Resp. App. 27a-28a, 34a-37a).

After enactment of Resolution No. 98-29, the Santa Clara Pueblo defendants again moved to dismiss *Kennedy, et al. v. Silva* on the grounds that Kennedy's and Singer's claims against Judge Silva were barred by judicial immunity, and that their claims against all defendants were barred by the Pueblo's sovereign immunity. Although the motion was fully briefed and argued, the *pro tem* judge never ruled on the motion, and he subsequently resigned. The case has thus never been resolved. (Resp. App. 27a, and n.2). Importantly, however, the claims raised in *Kennedy, et al. v. Silva* have nothing to do with the case Kennedy seeks to bring before this Court.

Just two weeks after the Tribal Council had enacted Resolution No. 98-29, and before the defendants in *Kennedy, et al. v. Silva, et al.* had filed their second motion to dismiss, Kennedy and Singer filed a new lawsuit in Santa Clara Tribal Court, naming as defendants the Pueblo's Governor, Lt. Governor and members of the 1998 Santa Clara Tribal Council, and attorney Hughes (the Respondents herein). *Kennedy, et al. v. Hughes, et al.*, No. CV 98-504. That suit claimed that the legislative action taken by the Tribal Council in enacting Resolution No. 98-29, and Respondent Hughes' role in drafting the resolution and advising the Council with respect to its passage, violated various provisions of the ICRA, the United States Constitution and the Santa Clara Pueblo Constitution. (Resp. App. 2a-4a, 28a). The suit sought $8 million in damages, plus other forms of relief.

The Santa Clara Tribal Court (through Tribal Judge *pro tempore* Frank DeMolli) ultimately dismissed the case on the merits in an opinion and order issued on September 19, 1999. (Resp. App. 1a-18a). Kennedy and Singer noticed an appeal from that ruling to the Santa Clara Court of Appeals, but as their counsel knew, that court had been abolished by the Santa Clara Tribal Council, and the Council had shifted appellate jurisdiction over final decisions of the Tribal Court to the Southwest Intertribal Court of Appeals, based at the University of New Mexico Law School. Kennedy and Singer never pursued an appeal to that appellate court. (Resp. App.28a, and n.3).

2. Proceedings in the Federal District Court.

In 2001, Kennedy and Singer filed a new lawsuit – this case -- in the United States District Court for the District of New Mexico, making claims identical to those they had asserted (and that had been disposed of on the merits) in *Kennedy, et al. v. Hughes, et al.*, in Santa Clara Tribal Court – that is, that their rights had been violated by the enactment of Tribal Council Resolution No. 98-29 -- and naming the identical parties defendant (Respondents herein). The complaint alleged jurisdiction under 28 U.S.C. §§ 1331 and 2201-2202, asserting that the claims arose under "the Laws and Constitution of the United States pursuant to the Indian Civil Rights Act of 1968. 25 U.S.C. § 1302 et seq." The district court granted Respondents' motions to dismiss the complaint, ruling that "it does not have jurisdiction over Plaintiffs' claims, or alternatively, that Plaintiffs fail to state claims upon which relief can be granted because ICRA does not authorize a cause of action such as Plaintiffs'," relying on *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). (Resp. App. 19a-24a). The district court did not reach or rule upon any of the other grounds for dismissal argued by Respondents

(legislative immunity, failure of Plaintiffs to exhaust tribal remedies and res judicata, and as to Respondent Hughes the additional defense of qualified immunity). (Resp. App.20a-21a). The district court did, however, reject Kennedy and Singer's attempts to bootstrap Kennedy's 1993 incarceration into a basis for federal jurisdiction over his 2001 federal court lawsuit. (Resp. App. 21a, n.1).

3. Proceedings in the Tenth Circuit Court of Appeals

Because Kennedy and Singer's federal suit was based solely on § 1302 of ICRA, the Tenth Circuit identified the threshold question on appeal to be "whether a private cause of action may be brought under that section." (Resp. App. 29a-30a). Applying this Court's ruling in *Santa Clara Pueblo,* 436 U.S. at 69, the Tenth Circuit held that "the District Court correctly dismissed this suit for lack of subject matter jurisdiction or failure to state a claim upon which relief may be granted" (Resp. App. 33a), since the only provision of ICRA that authorizes a private cause of action in the federal courts is 25 U.S.C. § 1303, the habeas corpus provision. (Resp. App. 29a-30a).

In so ruling, the Tenth Circuit rejected Kennedy's effort to evade dismissal by invocation of an anomalous "exception" to *Santa Clara Pueblo* recognized only in the Tenth Circuit decision in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981). (Resp. App. 30a-33a). (*See* discussion *infra*, n.6). Kennedy and Singer[1] then filed the Petition in this

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[1]Kennedy and Singer are both listed as Petitioners in the caption of this matter as it appears on the front of the Petition and on page 1.

Court, seeking reversal of the Tenth Circuit's decision affirming the dismissal of the federal court suit.

REASONS FOR DENYING THE WRIT

1. Introduction.

Contrary to the suggestion in Petitioner's Questions Presented (Pet. i) and throughout the text of the Petition, *e.g.*, Pet. 2, 3, 6, 7, the decisions below have nothing whatever to do with tribal assertion of jurisdiction over non-members, or the requirement of exhaustion of tribal remedies. The only issue addressed or decided by either the district court or the court of appeals, and thus the only decided issue which could properly be subjected to *certiorari* review in this Court, is whether Petitioner may bring an action in federal court asserting claims for damages arising under the Indian Civil Rights Act, 25 U.S.C. § 1302 ("ICRA"). On that issue, the decision below – that there is no federal cause of action created by that Act, nor any federal court jurisdiction for

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The text of the Petition begins with the plural word, "Petitioners," and the same word appears in the Statement of Jurisdiction, Pet. at 2. Thereafter, however, although there is no explanation for the change, the Petition utilizes the singular form, "Petitioner," and a significant portion of the argument is premised on the "Petitioner" not being a member of Santa Clara Pueblo. Kennedy is not a member of the Pueblo, but Singer is (Resp. App.26a), and those arguments (had they any merit or relevance to this case) could not be asserted on her behalf. Since, however, it appears that both Kennedy and Singer are Petitioners in this matter, all arguments set forth in this Response should be understood as applying to both of them, except these points where Petitioners' argument depends on Kennedy's status as a non-member of the Pueblo, which would only apply to him.

claims arising under it -- is not in conflict with, and is completely in accord with, every decision of every other court of appeals to have addressed the question, and with the only decision of this Court to have addressed it. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). The issue has been regarded as completely settled as a matter of federal law for the past 25 years, since this Court's landmark decision in *Santa Clara Pueblo*. Petitioner offers no reason for departing from this settled and consistent body of decisional law, and instead resorts to a remarkable effort to recharacterize (and indeed, to thoroughly mischaracterize) the issues presented by the case.

2. The Tenth Circuit's ICRA Rulings Do Not Conflict with the Rulings of this Court or Any Other Federal Circuit.

A. The Tenth Circuit Correctly Adhered to the Rule of *Santa Clara Pueblo v. Martinez* in Affirming the Dismissal For Lack of Subject Matter Jurisdiction or Failure to State a Claim

The Tenth Circuit's ruling that § 1302 of ICRA does not authorize a private cause of action in the federal courts does not conflict with any decision of this Court or with any decision of any other federal court of appeals. Indeed, that ruling was compelled by this Court's holding in *Santa Clara Pueblo,* and is in complete accord with the decisions of every other federal court of appeals to have faced cases under the ICRA since *Santa Clara Pueblo*. *E.g., Akins v. Penobscot Nation*, 130 F.3d 482, 486 (1st Cir. 1997) ("With exceptions for habeas corpus relief, Congress did not intend in the Indian Civil Rights Act to create implied causes of action to redress substantive rights in federal court"); *Garcia v. Akwesasne*

Housing Authority, 268 F.3d 76, 86 (2nd Cir. 2001) ("The Indian Civil Rights Act, for instance, imposes numerous substantive obligations on tribal governments but does not explicitly provide a private cause of action in federal court except via the writ of habeas corpus."); *Crowe v. Eastern Band of Cherokee Indians Inc.*, 584 F.2d 45, 45-46 (4th Cir. 1978) ("We find it unnecessary to reach the merits of the appeal since we conclude that under the Supreme Court's decision in *Santa Clara Pueblo v. Martinez* . . . the district court was without jurisdiction to entertain the action") (internal citations omitted); *TTEA Corp. v. Ysleta del Sur Pueblo*, 181 F.3d 676, 681 (5th Cir. 1999) (under Santa Clara Pueblo, federal court lacked subject matter jurisdiction for actions brought under Indian Civil Rights Act); *Sandman v. Bradley Dakota*, 816 F.Supp. 448, 451 (W.D. Mich 1992), ("Congress did not provide a private right of action in the Indian Civil Rights Act, but provided only the remedy of habeas corpus."), *aff'd* 7 F.3d 234 (6th Cir. 1993) (table); *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 951 F.2d 757, 764 (7th Cir. 1991) (citing *Santa Clara Pueblo v. Martinez* for ruling that Congress did not authorize the federal courts to adjudicate civil actions under ICRA except for those seeking *habeas corpus* relief); *Gaming Corporation of America v. Dorsey & Whitney*, 88 F.3d 536, 550 (8th Cir. 1996) ("The district court correctly noted that there is no private right of action under the Indian Civil Rights Act . . ."); *Demontiney v. United States*, 255 F.3d 801, 814 (9th Cir. 2001) (". . . we have generally found federal court jurisdiction for alleged violations of ICRA only in habeas corpus actions, not in civil actions."); *R. J. Williams Co. v. Ft. Belknap Hsg. Auth.*, 719 F.2d 979, 981 (9th Cir. 1983), (*Santa Clara Pueblo* "foreclosed any reading of [the Indian Civil Rights Act] as authority for bringing civil actions in federal court to request . . . forms of relief [other than habeas corpus]"), *cert. denied*, 472 U.S. 1016 (1985); *Florida*

Paraplegic v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126, 1130, 1134 (11th Cir. 1999) (citing *Santa Clara Pueblo* for the proposition that in enacting ICRA Congress had imposed "substantive limitations on Indian tribes without providing any means for most individuals to enforce their rights in federal court."). Thus, this case does not involve "a decision in conflict with the decision of another United States court of appeals on the same important matter" nor a decision in conflict with any decision of this Court, which might warrant certiorari review under Sup. Ct. R. 10(a) or (c).

B. *Santa Clara Pueblo v. Martinez* Applies With Equal Force to All Persons Whether Indian or Non-Indian

Kennedy[2] argues that the Tenth Circuit's adherence to *Santa Clara Pueblo* was error since that Court "failed to recognize that the rule in *Santa Clara* does not apply to this case because Petitioner is not a member of the Santa Clara Indian Tribe but resides on the reservation." (Pet. 4). This argument primarily rests on Kennedy's assertion that "[I]n *Santa Clara* . . . all parties to the suit were members of the Santa Clara Indian Tribe." (Pet. 4).

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[2] As explained *supra*, n.1, although the text of the Petition appears to treat Edward Kennedy, who is not a member of Santa Clara Pueblo, as the only Petitioner here, the caption and the beginning sections of the Petition indicate that Catherine Singer is also a Petitioner. Ms. Singer, however, is a Pueblo member, and thus none of the arguments set forth in the Petition dealing with the applicability of the ICRA to non-members, or the Pueblo's authority over non-members, could properly be raised on her behalf. The following discussion, and the discussion in sections 4 and 5.B., *infra*, should therefore be understood as applying only to the arguments raised on behalf of Petitioner Kennedy.

Kennedy's contention is wrong. The plaintiffs in *Santa Clara Pueblo* were Julia Martinez, who was a tribal member, and her adult daughter Audrey, who was not a member[3] (and, indeed, though 100% Indian by blood, was not a member of *any* Indian tribe). The point of their suit was that children of female tribal members married to non-members were denied membership in the Pueblo solely because their fathers were not Pueblo members. (Children of male members who married outside the Pueblo were fully eligible for membership.) They had sued under the ICRA seeking to compel their admission to membership in the Pueblo on an equal protection theory:

> Although the children were raised on the reservation and continue to reside there now that they are adults, *as a result of their exclusion from membership* they may not vote in tribal elections or hold secular office in the tribe; moreover, they have no right to remain on the reservation in the event of their mother's death, or to inherit their mother's home or her possessory interests in the communal lands.

436 U.S. at 52-53 (emphasis added).

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[3] Each of them sued in her own capacity, but also as representative of a class of persons similarly situated. The class represented by Audrey consisted of all children of female Pueblo members who had married outside of the Pueblo, and which children were, thus, denied membership in the Pueblo. *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 12 (D.N.M. 1975).

The other federal circuits addressing this issue have (like the Tenth Circuit, with one exception[4]) uniformly followed *Santa Clara Pueblo*, ruling that § 1302 of ICRA does not authorize a private right of action in federal district court irrespective of whether the plaintiff is or is not a member of the Indian tribe whose officials are alleged to have contravened some provision of that statute, and whether the plaintiff is Indian or non-Indian. The ICRA applies equally to "any person". (Pet. App.13a) (25 U.S.C. § 1302(8)); *Santa Clara Pueblo,* 436 U.S. at 65 ("Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." (Footnotes omitted.)); *Garcia v. Akwesasne Housing Authority,* 268 F.3d at 78, 88 (2nd Cir. 2001) (remanding non-member plaintiff's civil rights suit against tribal housing officials in part to give her an opportunity to show that there was some statutory basis upon which to found a private cause of action in federal court other than the ICRA which "does not explicitly provide a private cause of action in federal court except via a writ of habeas corpus"); *Dement v. Oglala Sioux Tribal Court*, 874 F.2d 510, 515 (8th Cir. 1989) (noting that ICRA's habeas corpus provision was available to "any person"); *R. J. Williams Co.*, 719 F.2d at 9811-982 (ICRA protects due process rights of "all persons", but district court should have dismissed non-Indian's ICRA action under *Santa Clara Pueblo)*; *White v. Pueblo of San Juan*, 728 F.2d 1307,

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[4] *See* discussion *infra*, at n.6 and accompanying text, concerning *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).

1312, n.1 (10th Cir. 1984) ("The protections afforded to 'any person' under the ICRA are not limited to American Indians, but apply also to non-Indians,"); *Dodge v. Nakai*, 298 F. Supp. 17, 24 (D. Az. 1968) (noting legislative history of ICRA regarding use of term "any person" instead of language limiting its protections to Indians only); *Florida Paraplegic*, 166 F.3d at 1134. (quoting § 1302 language extending ICRA's protections to "any person" regarding suit against tribe by non-Indian advocacy organization).

3. Since Neither Lower Court Ruled On Any Issue Respecting Exhaustion of Tribal Remedies, This Case Is Not a Suitable Vehicle For Addressing Such Issues

Petitioners also seek review on the ground that the Tenth Circuit somehow misapplied this Court's rulings respecting exhaustion of tribal remedies, citing *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Nevada v. Hicks*, 533 U.S. 353 (2001). Petitioners assert that "[t]he Tenth Circuit held that Petitioner had not exhausted his remedies as regarding [*sic*] other courts and, therefore, it had no jurisdiction to hear the claims." (Pet. 7). Petitioners framed their "question presented" based on this issue as "whether the District Court incorrectly interpreted this Court's rule regarding the requirement to exhaust remedies." (Pet. i).

In fact, however, neither the district court nor the Tenth Circuit made any ruling respecting failure to exhaust tribal remedies. The decisions in both courts were strictly limited to the issue of lack of jurisdiction over claims arising under ICRA, or alternatively, failure to state a claim upon which relief can be granted, both arguments having been raised in Respondents' Motions to Dismiss. The district court noted

that Respondents (defendants below) had also argued *inter alia* that "Plaintiffs' claims should be dismissed based on . . . failure of Plaintiffs to exhaust tribal remedies . . . ." (Resp. App. 20a). But (in view of its ICRA rulings), the District court held that it "need not address and will not decide the other issues raised by Defendants."(Resp. App. 20a-21a).

Likewise, the Tenth Circuit simply affirmed the district court's alternative rulings that it had no jurisdiction to entertain Petitioners' claims under ICRA or that Petitioners had failed to state a claim upon which relief can be granted. (Resp. App.31a-32a, 35a). Thus, there is no Tenth Circuit (or district court) ruling on exhaustion of tribal remedies to review in this case.[5]

Since there was no decision in either court below respecting the tribal exhaustion doctrine, that issue is not properly before this Court.

4. Kennedy's Status as an "Indian" or "Non-Indian" is Irrelevant to the Decision in This Case.

Kennedy concedes he "is for all intent [*sic*] and purposes considered an 'Indian' under the ICRA as a member of the Blackfeet Indian Tribe" (a federally recognized Tribe) (Pet.

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[5] Petitioner's argument also overlooks a critical aspect of the tribal exhaustion doctrine – it never applies unless there is already present some basis for the exercise of federal court jurisdiction to decide the claim presented. *National Farmers Union*, 471 U.S. at 853-854 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16, n.8 (1987). Since neither lower court found any basis for jurisdiction in this case, neither court could properly have reached the "exhaustion of tribal remedies" defense, and neither did.

4), and that he is a resident of the Pueblo married to a tribal member. *Id.* Nonetheless he claims the Tenth Circuit erred in treating him as an "Indian" rather than a "non-member Indian" or "non-Indian" in affirming the district court's dismissal under *Santa Clara*.

This "Indian," "non-member Indian" or "non-Indian" issue arose in connection with Kennedy's attempt to invoke the Tenth Circuit's discredited *Dry Creek Lodge* "exception" to this Court's holding in *Santa Clara Pueblo*. (Resp. App.22a-23a, 30a-33a).[6] Plaintiffs attempting to invoke this

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[6] *Dry Creek Lodge* appears to be the only decision of a federal court of appeals that, contrary to this Court's ruling in *Santa Clara Pueblo*, found a private cause of action under § 1302 of the ICRA, federal jurisdiction to hear the claim, and (apparently) an abrogation of tribal sovereign immunity. The case was originally filed in 1974, by non-Indian plaintiffs claiming that the tribes had barred them from access to their privately-owned land within the Wind River Reservation, the day before the opening of a hunting lodge that the plaintiffs had constructed on the property. The district court had dismissed the complaint, but the Tenth Circuit reversed. *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975). On remand, the case was tried to a jury, which returned a substantial verdict. The district court granted a new trial, but before the trial could occur this Court decided *Santa Clara Pueblo*, and the district court thereafter dismissed the complaint, viewing that decision as having eliminated any basis for a federal cause of action or federal court jurisdiction. In the second appeal, the Tenth Circuit erroneously observed that *Santa Clara Pueblo* dealt with a problem that was "strictly an internal one between tribal members and the tribal government relating to the policy of the Tribe as to its membership." 623 F.2d at 685. It also saw the decision in that case as hinging on the availability of ICRA enforcement by the Santa Clara tribal court, even though, as the opinion in *Santa Clara Pueblo* notes, at the time of that litigation

the only "court" at Santa Clara was the Tribal Council itself. *Santa Clara Pueblo*, 436 U.S. at 66 n.22. Noting that the Wind River tribal court had refused to hear the complaint of the plaintiffs in *Dry Creek Lodge*, the Tenth Circuit lamented that "[t]here has to be a forum where the dispute can be settled," 623 F.2d at 685, and it reversed the dismissal of the complaint. Judge Holloway dissented.

Since then, though the Tenth Circuit has regularly (as in the instant case; *see* Resp. App. 30a -33a) looked at whether an effort to sue a tribe or tribal official under the ICRA meets the requirements of the "*Dry Creek Lodge* exception" to *Santa Clara Pueblo*, no such case has ever been found, and the "exception" exists as a viable doctrine (if at all) only in the narrowest of cases that precisely track its factual elements. *See, Ordinance 59 Ass'n v. United States Dept. of the Interior Secretary*, 163 F.3d 1150, 1159 (10th Cir. 1998) (citing cases rejecting invocation of exception) ("With the exception of *Dry Creek* itself, we have *never* found federal jurisdiction based on the *Dry Creek* exception.") (emphasis in original). No other federal appellate court has ever followed the decision, and it has been criticized as at least questionable, if not plainly wrong, in light of the clear holding of *Santa Clara Pueblo*. *See, e.g., Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032, 1035, n.2 (9th Cir. 1999) (declining to apply *Dry Creek Lodge* and noting the Ninth Circuit recognizes habeas corpus action as only exception to exclusive tribal jurisdiction over ICRA claims); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 885, n.14 (2nd Cir. 1996), *cert. denied*, 519 U.S. 1041 (1996) . The Tenth Circuit itself has repeatedly narrowed the decision's application, to the point of crediting it with "minimal precedential value." *Ordinance 59 Ass'n.*, 163 F.3d at 1158; *see also, Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1346 (10th Cir. 1982) (recognizing exception only in cases involving "particularly egregious allegations of personal restraint and deprivation of personal rights"); *White*, 728 F.2d at 1312 (10th Cir. 1984) (noting necessity of construing *Dry Creek Lodge* narrowly to avoid conflict with *Santa Clara*). To be sure, consistent with its

anomalous exception in the Tenth Circuit must show that their case meets three requirements: "the dispute involves a non-Indian party; a tribal forum is not available; and the dispute involves an issue falling outside internal tribal affairs." (Resp. App. 30a). The claim, moreover, must also involve "particularly egregious allegations of personal restraint and deprivation of personal rights." (Resp. App. 30a, n.4). The district court found that Kennedy had failed to establish the "no tribal forum" and "not an internal tribal matter" elements, hence he could not invoke *Dry Creek Lodge* even if he "were found to be a non-Indian." (Resp. App. 22a-23a). The Tenth Circuit affirmed, primarily on the ground that Plaintiff had failed to demonstrate that no tribal forum was available to him, noting that "As to the existence of a tribal forum, the district court concluded that a tribal forum is available in this case, as plaintiffs have filed two actions before the Santa Clara Tribal Court, the second of which involved the same claim as in the instant federal case. . . . Plaintiffs have taken advantage of that forum, not once but twice. They did not prevail on the merits, but that does not entitle them to take their claim to federal court."(Resp. App. 31a-33a).

Whatever the merits of Kennedy's "Indian," "non-member Indian" or "non-Indian" argument in other contexts, this case is not a proper vehicle for addressing it, since neither the district court nor the Court of Appeals ever ruled upon it. Both courts expressly declined to reach that issue since each ruled that other grounds existed for dismissing Petitioners'

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avoidance of any mention of the arguments actually presented by Petitioners to the lower courts in this case, the Petition makes no reference to *Dry Creek Lodge*.

suit under *Santa Clara Pueblo* even if Kennedy were "found to be a non-Indian." (Resp. App.22a-23a, 31a).

5. Kennedy's *Nevada v. Hicks* Arguments Were Not Timely Raised and Are Without Merit

A. Kennedy Did Not Timely Raise and Neither Lower Court Ruled On Any Issue Relevant to *Nevada v. Hicks*

Petitioners did not raise any argument based on *Hicks* before the district court, nor did they even cite to *Hicks* in any pleading or legal memorandum filed with that court. Since they had failed to raise this argument in the district court, and its outcome did not affect the Tenth Circuit's appellate jurisdiction, the Tenth Circuit did not consider or rule upon Petitioners' belated *Hicks* argument. Once again, Petitioners now seek review on an issue not decided below, hence not suitable for review by this Court in this case.

B. *Hicks* is Irrelevant to the Issues in This Case, as There Was No Assertion of Jurisdiction Over Kennedy by Santa Clara Pueblo in the Action of Which Petitioners Complain, and Nothing in *Hicks* Changed the Jurisdictional Rules Respecting ICRA.

Even had Kennedy timely raised his *Hicks* argument, and had the Tenth Circuit ruled on it, the argument is utterly without merit. As presented in the Petition, (Pet. 5-6), the argument is obscure, but it appears to be that the Pueblo's "exercise of tribal authority over petitioner" was not necessary to protect the Pueblo's "interests of self-government" and "in no way relate[s] to . . . principles of

necessary tribal authority." Yet, the specific tribal action at which Petitioners' complaint in this case was directed was the Tribal Council's enactment of Resolution No. 98-29, by which the Council simply reaffirmed the vitality of the Pueblo's sovereign immunity defense. This act cannot logically be characterized as an exercise of jurisdiction over Kennedy at all; rather, it was an appropriate and purely defensive measure, intended to limit the exercise of court jurisdiction over the Pueblo and its officers and employees. *Cf. Pyca Industries, Inc. v. Harrison Co. Waste Water Mgt. Dist.*, 81 F.3d 1412 (5th Cir. 1996); *Grimes v. Pearl River Valley Water Supply Dist,* 930 F.2d 441 (5th Cir. 1991), both recognizing that governmental sovereign immunity is a legitimate subject of legislative consideration; and, that changes in the law of immunity, even those that may affect pending litigation, do not amount to actionable violations of rights of litigants.

Moreover, as the district court found, Petitioners' claims were directed at issues, in particular tribal legislation respecting its sovereign immunity from suit, that "are plainly internal matters and are at the very heart of tribal self-governance and self-determination." (Resp. App. 22a-24a). Even if it could be somehow seen as an assertion of jurisdiction over Kennedy, the resolution would still pass the *Hicks* standard, which permits the exercise of tribal power over non-Indians that "'*is necessary to protect tribal self-government.*'" 533 U.S. at 359 (*quoting Montana v. United States*, 450 U.S. 544, 564 (1981)) (emphasis in *Hicks*). If Kennedy's *Hicks* argument is actually directed at the exercise of tribal court jurisdiction over him, the obvious answer to that complaint is that he invoked the jurisdiction of the Santa Clara Tribal Court himself, at least twice, and never challenged its jurisdiction to adjudicate his disputes with the Pueblo.

Finally, this Court expressly limited its jurisdictional rulings in *Hicks* to circumstances in which Indian tribal courts attempt to exercise civil jurisdiction over state officials sued for their official conduct:

> Our holding in this case is limited to the question of tribal court jurisdiction over State officers enforcing state law.

Hicks, 533 U.S. at 359, n.2. Thus, nothing in *Hicks* altered this Court's ICRA ruling in *Santa Clara Pueblo*.

This Court did in *Hicks* reiterate the tribal court jurisdictional principles established under "the path-marking case" of *Montana* applicable when a non-Indian defendant is involuntarily subjected to the exercise of a tribal court's jurisdiction. *Hicks,* 533 U.S. at 359. But here, the only tribal court lawsuit affected by the exercise of the Pueblo's legislative authority via enactment of Resolution 98-29 was the suit for money damages Kennedy and Singer filed in the Santa Clara Tribal Court in 1998 against Respondents. Having themselves invoked the jurisdiction of the Santa Clara Tribal Court, neither can complain that they were involuntarily subjected to the exercise of that court's jurisdiction.

CONCLUSION

We therefore respectfully request that the Court deny the Petition for Writ of Certiorari sought by Petitioners.

Respectfully submitted,

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APPENDIX A

IN THE TRIBAL COURT
OF THE PUEBLO OF SANTA CLARA
COUNTY OF RIO ARRIBA
STATE OF NEW MEXICO

CASE NO: CV-98-504

[Filed September 17, 1999]

EDWARD KENNEDY and	)
CATHERINE A. SINGER,	)
Plaintiffs,	)
	)
v.	)
	)
RICHARD HUGHES, Individually	)
and	)
GOVERNOR WALTER DASHENO,	)
in his official capacity,	)
LT. GOVERNOR EDWIN TAFOYA,	)
in his own capacity,	)
SECRETARY DALE BACA,	)
in his own capacity,	)
TREASURER CHARLES SUAZO,	)
in his official capacity,	)
INTERPRETER JOSEPH VAL GUTIERREZ,	)
in his official capacity,	)
SHERIFF C. ANTHONY SUAZO,	)
in his official capacity,	)

COUNCILMAN JOHN SHUE,)
in his official capacity,)
COUNCILMAN FRANCIS TAFOYA,)
in his official capacity,)
COUNCILMAN ALVIN WARREN,)
in his official capacity,)
COUNCILMAN DENNY GUTIERREZ,)
in his official capacity,)
COUNCILMAN GEORGE GUTIERREZ,)
in his official capacity,)
Defendants.)
_____)

OPINION AND ORDER

Plaintiffs are residents of the Pueblo of Santa Clara, one of whom is an enrolled member of the Pueblo. Plaintiffs bring this action against Pueblo of Santa Clara Tribal Council members, the tribal sheriff, and a tribal attorney. Plaintiffs allege violations of the Pueblo of Santa Clara Constitution, the U.S. Constitution, and the Indian Civil Rights Act of 1968. Plaintiffs claim defendants violated their rights when the Tribal Council passed a resolution that reaffirmed the sovereign immunity of the Pueblo officials and its judiciary. The resolution effectively precluded plaintiffs' pending case on a different matter.

PROCEDURAL HISTORY

In December 1998, Plaintiff Edward M. Kennedy sued the Chief Judge of the Santa Clara Pueblo Tribal Court and the fourteen Santa Clara Tribal Council members serving for the year 1998. His wife, Plaintiff Catherine A. Singer joined in the suit. The suit is entitled *Edward Kennedy and Catherine A. Singer v. Dennis Silva, et al*, Santa Clara Tribal Court

Case No. CV-96-436. Mr. Kennedy is an enrolled member of the Blackfeet Indian Tribe and a resident of the Pueblo of Santa Clara. Mrs. Singer is an enrolled member of the Pueblo of Santa Clara and a resident of the pueblo of Santa Clara.

Case No. CV-96-436 was pending when the current suit was filed. The litigation that is the subject of the current dispute, Case No. CV-98-504, involves allegations of violations of the Santa Clara Pueblo Constitution and the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§1301-1303. Specifically, the plaintiffs claim that one of the defendants, Attorney Richard Hughes, negligently, or, intentionally, deceived, the 1998 Tribal Council members into passing Resolution 98-29. The practical effect of Resolution 98-29 is to preclude any further action in the plaintiffs' pending ease, CV-96-436.

Resolution 98-29 is entitled *Reaffirming the Immunity of the Pueblo and of its Judges and Court Personnel from Suit*. Resolution 98-29 "reaffirms the action taken by the resolution adopted by the Tribal Council on December 7, 1983, repealing Section 60.4 of the Tribal Code..." Section 60.4 waived the sovereign immunity defense for certain persons in matters of alleged civil rights violations. Resolution 98-29 also recognizes the doctrine of judicial immunity for the Santa Clara Judiciary and states that the doctrine, "...has been in full force and effect ever since the creation of such courts..."

Resolution 98-29 passed with 10 Tribal Council members voting in favor, 0 against, and two abstentions.

The plaintiffs claim that Resolution 98-29 was introduced and passed "for the sole and exclusive purpose" of

eliminating plaintiffs' claims in CV-96-436. The plaintiffs allege that two Tribal Council members subsequently attempted to withdraw their votes of approval. The plaintiffs do not state the reason for the attempted withdrawal nor the result of the attempted withdrawal.

The plaintiffs also characterize the passage of Resolution 98-29 as a bill of attainder or an ex post facto law. The ICRA prohibits passage of any bill of attainder or ex post facto law. The plaintiffs also allege that the passage of Resolution 98-29 violates their Santa Clara Pueblo Constitutional Rights as those rights recognize U.S. Constitutional Rights and the ICRA. The plaintiffs also allege that the passage of Resolution 98-29 is an invalid legislative act because it violates the Santa Clara Pueblo Constitution, the United States Constitution as recognized by the Santa Clara Constitution and the ICRA.

The plaintiffs also allege a conspiracy to violate civil rights, deprivation of liberty, denial of due process, and a lack of equal protection under the law.

Due to these alleged violations, the plaintiffs request compensatory and punitive damages of $8,000,000, interest, a judgment invalidating the passage of Resolution 98-29 as unconstitutional, injunctions against enforcing or asserting Resolution 98-29, and other relief, including a jury trial.

In December 1998, the presiding judge recused himself because of his substantial interest in the case.

In January 1999, the defendants filed their Motion to Dismiss on Grounds of Sovereign Immunity and Memorandum in Support of the Motion.

In January 1999, in accord with the Tribal Law and Order Code, Judge Frank Demolli was appointed judge pro-tempore.

The plaintiffs opposed Judge Demolli's appointment, stating that Judge Christopher Harrington, presiding in Case CV-96-436, would be able to handle an related claims and defenses in a more effective and efficient manner.

In January 1999, the plaintiffs also filed a Memorandum In Opposition to the Motion to Dismiss and a Motion to Strike the Defense of Sovereign Immunity.

In March 1999, the defendants filed a Motion to Dismiss all Claims Against Richard Hughes On Grounds of Legislative Immunity, Other Failure to State Claims Upon Which Relief May Be Granted and Qualified Immunity.

On July 1, 1999, Pueblo of Santa Clara Governor Walter Dasheno reaffirmed Judge Pro Tempore Frank Demolli's appointment in Case No. CV 98-504.

With the reaffirmation, Judge Demolli engaged on an exhaustive review of the controlling law, the numerous allegations and the motions made by both parties.

For the reasons cited below, this Court finds that it has both subject matter and personal jurisdiction in this matter.

THE PUEBLO OF SANTA CLARA CONSTITUTION AND BYLAWS

While many of the Pueblos of New Mexico choose to be governed by unwritten or traditional forms of government, the

Pueblo of Santa Clara chose to be controlled, in secular matters, by a Constitution and Bylaws. The Pueblo of Santa Clara Constitution and Bylaws were approved by the Secretary of the Interior on December 20, 1935. A federal district court found that Pueblo of Santa Clara Constitution, "which drew upon both traditional Pueblo and modern Anglo-American institutions," synthesized them into "a unique structure neither wholly traditional nor wholly modern." *Martinez v. Romney*, 402 F Supp 5, 15 (D.N.M. 1975)

The pueblo of Santa Clara Constitution and Bylaws have remained in effect since 1935 without substantial changes. Therefore, this Court adopts the Martinez Court's interpretation of their genesis and finds that they are the governing rules for this Court.

The Tribal Council's preeminence in the Pueblo of Santa Clara Constitution is in stark contrast to the separation or powers in other Tribal Constitutions and the United States Constitution.

For instance, the Constitution of the Cherokee Nation of Oklahoma, Article IV, *Distribution of Powers,* states:

> The powers of the government of the Cherokee Nation shall be divided into three (3) separate departments: Legislative, Executive and Judicial; and except as provided in this Constitution, the Legislative, Executive and Judicial departments of government shall be separate and distinct and neither shall exercise the powers properly belonging to either of the others.

Article IV of the Pueblo of Santa Clara Constitution, *The Pueblo Council and Its Powers,* vests legislative and judicial power in the pueblo council.

> Section 1. *Legislative power* - The legislative power shall be vested in the pueblo council, and the said power shall be exercised in accordance with, and not in conflict with, the constitution or laws of the United States of America.
>
> The pueblo counsel shall have the following rights and powers:
>
> 1. To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior...
>
> 2. To enact ordinances, not inconsistent with the constitution and bylaws of the pueblo, for the maintenance of law and order within the pueblo...
>
> Section 2. *Judicial power*- The Pueblo council shall also adjudicate an matters coming before it over which it has jurisdiction. In all controversies coming before the pueblo council, the council shall have the right to examine an witnesses and ascertain full details of the controversy and after the matter shall have been sufficiently commented upon by the interested parties, the council shall retire to a private place to make a decision.

Article IV of the Bylaws, entitled *Personal Liberties,* is a guarantee of rights as a citizen of the United States.

> Section 1. *Private Rights of each member of the pueblo.* - Each member of the pueblo of Santa Clara shall be assured his private rights as a citizen of the United States, and no attempt shall be made by the officers of the pueblo to enforce any order upon him depriving him of said rights.

This Court looks to the Constitution and Bylaws for guidance in this case. Therefore, this Court finds that while the Pueblo of Santa Clara recognized the private rights of members of the Pueblo and the Constitutional rights of Americans, both the legislative and judicial powers were placed in the Tribal Council.

PUEBLO OF SANTA CLARA JUDICIAL POWER

In December 1981, the Pueblo of Santa Clara enacted a Civil and Criminal Tribal Law and Order Code (Code). Chapter 2 of the Code vested the tribal judiciary with the Judicial Power of the people of the Pueblo of Santa Clara. The subject matter jurisdiction contained in the Santa Clara Pueblo Constitution, Article IV, Section 2 was removed to the tribal judiciary.

Chapter 60 of the Code also outlined civil rights protections. Chapter 60, *Civil Rights Protection,* created a Civil Rights Commission. To the best of the Court's knowledge, the Commissioners were never appointed by the Governor. However, Section 60.3, *Complaint of Civil Rights Violation,* authorized the Tribal Court to hear alleged

violations of the Indian Civil Rights Act. Chapter 60 also allows the Tribal Court to hear any other civil rights violations listed in the Pueblo of Santa Clara Constitution.

This Court notes with interest that Section 60.7, *Appeals from Orders of the Tribal Court,* allows Tribal Court Orders in civil rights cases to be appealed to the Tribal Council.

Therefore, the Court finds that: The 1981 Code transfers judicial authority from the Tribal Council to the Tribal judiciary; the 1981 Code also protects rights guaranteed by the ICRA and rights guaranteed by the customs and traditions of the Pueblo; this Court also finds that the language found in Chapter 60, *Civil Rights Protection,* indicates the Pueblo's wish to protect civil rights guaranteed by the United States Constitution and United States laws.

However, this Court finds that the Tribal Council reserves the right to hear the final appeal from Tribal Court Orders in civil rights cases. The Court also finds that the reservation of Tribal Council powers reflects the traditions and customs of the Pueblo of Santa Clara as embodied in the Tribal Constitution and Bylaws.

THE RELEVANCE OF *SANTA CLARA PUEBLO V. MARTINEZ*

The seminal case of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) vividly portrays the inherent struggle between an individual's civil rights and the interpretations of those civil rights by a Tribe:

> The equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore be preserved .... Such a determination should be made by the people of Santa Clara; not only because they can best decide which values are important, but also because they must live with the decision every day...
>
> *Santa Clara Pueblo,* 436 U.S. at 54, quoting *Martinez v. Romney,* 402 F. Supp. 5 (D.N.M. 1975).

While the *Santa Clara Pueblo* Court spoke of federal court intervention in an ICRA action, the analogy applies to the plaintiffs' requests in the action before this Court. Despite any opinions a person may hold concerning the exercise of civil rights, the Pueblo of Santa Clara traditions, customs and the Constitution and Bylaws overwhelmingly favor the Tribal Council interpretations of any law that governs an individual's civil rights.

FEDERAL AND TRIBAL COURT INTERPRETATIONS OF CIVIL RIGHT GUARANTIES

Federal courts have also held that the ICRA guarantees should be interpreted against the background of tribal sovereignty and within the context of tribal law and custom. *Martinez v. Romney*, 402 F. Supp. 5 (D.N.M. 1975), *Crowe*

v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231 (4th Cir. 1974); *Means v. Wilson*, 383 F. Supp. 378 (D.S.D. 1974).

Facing similar issues raised by the instant case, other tribal courts have also used the background of tribal sovereignty and the context of tribal law and custom to address claims of civil rights violations.

In Kizer v. Walker River Housing Authority, WR-CV-95-54 [23 Indian L. Rep. 6214] (Inter-Tr. Ct. App., Nev., June 10, 1996), the tribal appellate court reversed a lower court decision that the Tribe's sovereign immunity protected the Tribe from a contractual lawsuit. The Inter-Tribal Court of Appeals of Nevada ruled that the tribal immunity was waived for the purpose of permitting the Tribal Court to determine whether ICRA due process rights had been violated. "To hold otherwise," the Court stated, "would leave us with a right, the breach or denial of which, is without a remedy." See *Kizer, supra,* at 6215.

In 1997, a member of the Fallon Paiute-Shosone Tribe sought tribal court relief in an unspecified ICRA action. The tribal court dismissed the action on grounds of the Tribe's sovereign immunity. The Inter-Tribal Court of Appeals of Nevada overruled the tribal court. Citing *Kizer*, the tribal appellate court held that the ICRA itself is a waiver of the immunity of the Tribe for the narrow purpose of vindicating rights guaranteed by the ICRA and ordering an appropriate remedy. The Court also ruled that tribal forums must be available to claimants under the ICRA. *Works v. Fallon Paiute-Shoshone Tribe*, C-FT 96-014 [24 Indian L. Rep. 6078] (Inter-Tr. Ct. App., Nev., Feb. 25, 1997).

The Navajo Courts are universally recognized for interpreting Navajo law against the background of tribal sovereignty and in the comext of tribal law and custom. For the Navajo Nation, the ICRA has been held not to waive the sovereign immunity of Indian tribes, including the Navajo Nation in any court. *Johnson, et al. Navajo Nation, et al.*, No. A-CV- 16-85 [14 Indian L. Rep. 6037] (Nav. Sup. Ct, Oct. 20, 1987). In *Johnson* the plaintiffs alleged that Navajo police officers acted negligently and caused physical injuries to one of the plaintiffs. The complaint alleged that the conduct violated ICRA guarantees. After its ruling on sovereign immunity, the Johnson Court conducted an enquiry into the enforcement of civil right guarantees on the Navajo Nation. The Johnson Court stated:

> *Santa Clara Pueblo v. Martinez,* id., does instruct us that Indian tribes should provide forums "to vindicate rights created by the ICRA." 436 U.S. at 65. Indian tribes may have to amend their laws, or enact laws, which will conform to the rights created by the ICRA, because the ICRA "has the substantial and intended effect of changing the law which [tribes] are obliged to apply." 436 U.S. at 65. The Navajo Courts have always been available for the enforcement of civil rights created by the ICRA and the Navajo Bill of Rights, 1 N.T.C. § et seq. (1986 Amendment). Enforcement has generally been through suits against tribal of officials for acting outside the scope of their authorities.... Finally the Navajo Bill of Rights contains substantially the same

rights as those found in the ICRA. See 74 ILR at 6040, 6041.

This Court finds that the many tribal and federal courts that have considered claims of civil rights violations analyze those claims against the background of tribal sovereignty and in the context of the particular Tribe's law and custom.

Unless overruled through a Tribal Council Resolution or an express and unequivocal congressional waiver of the Tribe's sovereign immunity, the Santa Clara Tribal Court shall adopt the following analysis in reviewing civil rights claims arising under ICRA, the Santa Clara Constitution, or under federal law: Any civil rights claim shall be reviewed using the background of tribal sovereignty and in the context of the Pueblo of Santa Clara' s unique tribal law and custom.

CONCLUSIONS, OF LAW

The Pueblo of Santa Clara Constitution and Bylaws reflect the preeminence of the Tribal Council in matters regarding allegations of civil rights violations. In no instance has the Tribal Council abdicated its power to pass final judgement on any allegation of any rights violation. Nor has the Tribal Council abdicated its power to pass legislation clarifying sovereign immunity. With this in mind, the Tribal Court must take Resolution 98-29 at face value. Resolution 98-29 reaffirms prior Tribal Council actions and recognizes the immunity of the Pueblo officials and of its judges and court personnel from suit.

The plaintiffs" well-pled argument that the passage of Resolution 98-29 represents a Bill of Attainder, must fail in

light of the Pueblo of Santa Clara's unique tribal law, reflected in its Constitution and Bylaws, The plaintiffs logically and passionately argue that:

> The "separation of powers" was not instituted by the United States with the idea it would promote governmental efficiency. On the contrary, it is looked to as a bulwark against tyranny. If governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, "no man or group of men" will be able to impose its unchecked will U.S. v. Brown, 85 S. Ct. 1707, 1712, 381 U.S. 437 (1965).

The plaintiffs fail to recognize that there has never been an implied or explicit "separation of powers" of equal branches of government in the Pueblo of Santa Clara. The Tribal Council is preeminent over all branches of government. Such a division of equal branches is certainly within the power of the Pueblo of Santa Clara to create. However, the Court has failed to find any evidence that the Pueblo of Santa has ever considered such a division of equal branches. Therefore, this Court must defer to any legislative resolution validly created by the authorized government.

The Tribal Council is the legitimate government of the Pueblo. As Resolution 98-29 was passed by the majority of the Tribal Council members, any due process argument fails. The passage of legislation "clarifying" a point of law is a legitimate exercise of legislative power.

No enrolled member is prohibited from participating in the legislative process. Any enrolled member may effect legislation by meeting the spiritual and secular requirements to serve on the Tribal Council. This Court has not found any prohibition against elected Tribal Council members presenting pending legislation to the enrolled members for their opinions. Likewise, this Court has also not found any prohibition against any person presenting prospective legislation, through a representative, to Tribal Council.

As Resolution 98-29 applies equally to all persons, the plaintiffs' equal protection claim fails.

Resolution 98-29 was legitimately passed by the authorized government of the Pueblo of Santa Clara. Therefore, the plaintiffs' claims in the instant case are dismissed for failure to state claims upon which relief may be granted. Thus, the Court will not need to address the sovereign immunity issue.

AVAILABLE REMEDIES FOR VIOLATIONS OF CIVIL RIGHTS CLAIMS

In its wisdom, the Pueblo of Santa Clara guarantees three avenues to remedy violations of civil rights claims- the Civil Rights Commission, the Tribal Court, and the Tribal Council.

Both the Civil Rights Commission and the Tribal Court have been discussed in this opinion. This Order is limited to the facts of this case, by the boundaries outlined in the Pueblo of Santa Clara Constitution and Bylaws, and Resolution 98-29.

However, the Court notes that the Pueblo of Santa Clara Constitution, Article III, *Conduct of Council Meetings*, Section 3, *Matters of general interest to pueblo*, outlines another remedy to address grievances.

> In all matters in which all of the people of the pueblo of Santa Clara are interested, the pueblo council shall cause the sheriff to notify all members of the pueblo of the time and place at which such business is to be transacted... If any member of the pueblo wants a special meeting for all the people in the pueblo, he will first get permission from the pueblo council through a representative, or through the Governor.

Finally, the Constitution, Article III, Section 4, *Special meetings on grievances,* states that:

> If any member of the pueblo of Santa Clara has any grievance against any other member of the said pueblo which cannot await settlement at the regular pueblo council meeting, he shall report the same to the Governor who, if he deems that the case requires speedy attention, shall call a special meeting of the council....

While the Court has carried on its research for this opinion and order, it kept in mind the words of trial jurist Carey N. Vicenti:

> Tribes must be left free to decide for themselves what a system of civil rights

> enforcement is, free from the coercion of federal investigations, American chauvinism, American ethnocentrism, and American insecurities about the strange Indian nations which are developing within the American body politic.
>
> The burden to solve the dilemma placed upon tribal societies by the introduction of civil rights is upon every person who is involved with the legal life of the Tribes. Sincerity among an the players is an absolute precondition...
>
> If it is irresponsible for an attorney to not have adequately researched an issue, is it not also irresponsible to not have researched the traditions of the Tribe to determine the traditional powers of the individual and the government? Or the tradition respecting the immunity of leaders?
>
> -*The Indian Civil Rights Act and the Judicial Enhancement Acts: Revisiting and Reexamining Their Impact,* CLE Indian Law Section Seminar, March 12, 1993.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all persons recognize Tribal Council Resolution 98-29 as a valid, enforceable legislative act.

IT IS FURTHER ORDERED that the defendants' Motion for Failure to State Claims Upon Which Relief May Be Granted is granted.

IT IS FURTHER ORDERED that all counts of the plaintiffs' complaint against all defendants are dismissed for failure to state claims upon which relief may be granted.

DATED SEPTEMBER 17, 1999.

/s/ _____
Frank Demolli
Judge Pro-tempore
Pueblo of Santa Clara

FILED
IN MY OFFICE THIS
SEP 17 1999

/s/ _____
CLERK, SANTA CLARA TRIBAL COURT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. CIV 01-1183 WJ/LFG

[Filed March 26, 2002]

EDWARD KENNEDY et al,
Plaintiffs,

v.

RICHARD HUGHES et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court pursuant to Defendant Richard Hughes' Motion to Dismiss Complaint [Docket No. 25] and a Motion to Dismiss Complaint [Docket No. 5] filed by Defendants Dasheno, E. Tafoya, Baca, C. Suazo, I. Gutierrez, A. Suazo, Chavarria, Shije, F. Tafoya, Warren, D. Gutierrez, and G. Gutierrez (the "Tribal Defendants").

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Plaintiffs filed a Complaint in this Court on October 12, 2001. Plaintiff Kennedy is a resident at Santa Clara Pueblo, an enrolled member of the Blackfeet Indian Tribe, and married to Plaintiff Singer. Plaintiff Singer is a resident of the Santa Clara Pueblo and an enrolled member of the Santa Clara Indian Pueblo. The "Tribal Defendants" are all enrolled members of the Santa Clara Indian Pueblo and officials of the Pueblo. These persons are sued in their individual capacities. Defendant Hughes is an attorney who provided legal services to the Tribal Defendants. Hughes is a non-Indian and does not reside at the Santa Clara Pueblo.

Plaintiffs' Complaint alleges federal question jurisdiction under 28 U.S.C. § 1331 pursuant to the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1302 et seq. Plaintiffs essentially allege that the Hughes and the Tribal Defendants violated their rights under the ICRA by drafting and adopting a tribal resolution that retroactively reinstated tribal sovereign immunity in tribal court while Plaintiffs had a claim against the tribe pending in tribal court.

DISCUSSION

Defendant Hughes and the Tribal Defendants argue that this Court lacks jurisdiction over Plaintiffs claims, or alternatively, Plaintiffs have failed to state a claim upon which relief can be granted because the ICRA does not create a private cause of action on which a party may bring a civil action such as Plaintiffs' complaint. Defendant Hughes and

the Tribal Defendants also urge that Plaintiffs' claims should be dismissed based on legislative immunity, failure of Plaintiffs to exhaust tribal remedies, and res judicata. Defendant Hughes additionally argues that Plaintiffs' claims should be dismissed because the tribal resolution at issue in this case did not violate any of Plaintiffs' rights as it was not a bill of attainder and did not deprive Plaintiffs of liberty or property. Defendant Hughes further asserts that there was no conspiracy between Hughes and Tribal Defendants. Finally, Defendant Hughes urges this Court to find that Tribal Defendants and Hughes are entitled to qualified immunity.

This Court finds that it does not have jurisdiction over Plaintiffs' claims, or, alternatively, that Plaintiffs fail to state claims upon which relief can be granted because the ICRA does not authorize a cause of action such as Plaintiffs'.[1] *Santa Clara Pueblo v Martinez*, 436 U.S. 49 (1978). Thus, this Court need not address and will not decide the other issues raised by Defendants, many of which appear to be issues of first impression in the Tenth Circuit. The Court commends Defendants for their briefs on these other issues, and while tempted to engage in an academic discussion of the application of legislative immunity, res judicata, and qualified immunity

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[1] The Court recognizes that the factual allegations in Plaintiffs' Complaint at ¶¶ 28 - 36 and 46 - 50 standing alone could be read to attempt to invoke the habeas corpus provisions of Section 1303 of the ICRA. However, the Complaint read in its entirety makes clear that these are merely background facts to explain Plaintiffs' first cause of action in tribal court (CV96-436) that they allege was frustrated by Defendants when a resolution was passed reinstating tribal sovereign immunity.

to this case, the Court will save these issues for another day and another case.

The ICRA provides that "No Indian tribe in exercising its powers of self-government shall ... deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law...." 25 U.S.C. § 1302. As the Supreme Court noted in *Martinez*, the only express remedial provision found within the ICRA is Section 1303 which extends the writ of habeas corpus in federal court to test the legality of a person's detention by order of an Indian tribe. 436 U.S. at 58. The Court in *Martinez* held that, in passing the ICRA, Congress did not intend to create a federal forum for issues arising under Section 1302 of the ICRA and that the failure to provide a remedy other than habeas corpus was a deliberate one. *Id.* at 59-60. Thus, in accordance with *Martinez*, a plaintiff alleging a violation under the ICRA does not state a claim upon which relief can be granted unless plaintiff is in court by writ of habeas corpus. Additionally, courts have found that federal question jurisdiction does not lie for a claim under the ICRA except by writ of habeas corpus. *See Olguin v Lucero*, 87 F.3d 401 (10th Cir. 1996).

Plaintiffs urge this Court to allow their ICRA claim to proceed in federal court under the exception to *Martinez* found in *Dry Creek Lodge, Inc. v Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). The "absolute necessity" exception found in *Dry Creek Lodge*, is narrowly construed. *White v Pueblo of San Juan*, 728 F.2d 1307 (10th Cir. 1984). In order to qualify for the *Dry Creek* exception, a plaintiff must demonstrate that the dispute involves a non-

Indian party, that a tribal forum is not available, and that the dispute involves an issue falling outside internal tribal affairs. *Ordinance 59 Ass'n v United States Dep't. of the Interior Secretary*, 163 F.3d 1150, 1156 (10th Cir. 1998).

Plaintiffs contend that Plaintiff Kennedy is a non-Indian party to this dispute. The Court recognizes that Plaintiff Kennedy is not a member of the Santa Clara Pueblo, but is an enrolled member of the Blackfeet Indian Tribe. *Dry Creek* and its progeny have not clarified whether a non-member Indian would qualify as a non-Indian for purposes of the *Dry Creek* exception. This Court, however, need not delve into this delicate matter because Plaintiffs have failed to show that they would be entitled to the exception if Kennedy was found to be a non-Indian.

Plaintiffs have failed to show that a tribal forum is not available to address their dispute. Plaintiffs state that a tribal forum is effectively and practically unavailable because the tribal forum has been dilatory in addressing Plaintiffs' various causes of action, and because the tribal government disbanded its appellate court system and adopted an intertribal appellate forum during the pendency of Plaintiffs' appeal from the tribal court decision on their case. Complaint ¶¶ 77, 78, 97, 98, 101. Plaintiffs are required to show that a tribal forum is actually unavailable; allegations of futility are insufficient. *See White v San Juan Pueblo*, 728 F.2d 1307, 1313 (10th Cir. 1984); *Jimi Development Corp. v Ute Mountain Ute Indian Tribe*, 930 F.Supp. 493 (D. Colo. 1996). Because Plaintiffs admit in their pleadings that their various cases are still pending before the tribal fora, they have failed to show that no tribal forum is available.

Plaintiffs also fail to show that their dispute involves issues falling outside internal tribal affairs. Plaintiffs' dispute involves the tribal council's decision regarding tribal sovereignty in a civil rights suit in tribal court, and the tribal council's decision regarding the tribal court structure. Complaint ¶¶ 85, 98, 108 - 115, 117 - 121,123, 124, 125, 126. These issues are plainly internal tribal affairs and are at the very heart of tribal self-governance and self-determination.

Thus, Plaintiffs have failed to show that the *Dry Creek* exception applies in this case. Accordingly, Defendants are entitled to a dismissal of all claims with prejudice because Plaintiffs have failed to state a claim upon which relief can be granted or, alternatively, this Court lacks subject matter jurisdiction to hear Plaintiffs claims.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant Richard Hughes' Motion to Dismiss Complaint [Docket No. 25] and the Tribal Defendants' Motion to Dismiss Complaint [Docket No. 5] are GRANTED and Plaintiff's Complaint is DISMISSED with prejudice in its entirety.

/s/ _____
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 02-2112
(D.C. No. CIV-01-1183-WJ/LFG)
(D. New Mexico)

[Filed March 20, 2003]

EDWARD KENNEDY; CATHERINE A. SINGER, Plaintiffs-Appellants,	)
v.	)
RICHARD HUGHES; WALTER DASHENO; EDWIN TAFOYA; DALE BACA; CHARLES SUAZO; JOSEPH VAL GUTIERREZ; C. ANTHONY SUAZO; JOSE N. CHAVARRIA; JOHN SHIJE; FRANCIS TAFOYA; ALVIN WARREN; DENNY GUTIERREZ; GEORGE GUTIERREZ, Defendants-Appellees.	)

Before LUCERO, BALDOCK, and McCONNELL, Circuit Judges.

ORDER AND JUDGMENT*

Plaintiffs, members of two different Indian tribes, filed suit in federal district court against several officials of the Santa Clara Pueblo Tribe, claiming violations of their civil and constitutional rights as protected by the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301 *et seq.* Concluding that ICRA does not authorize plaintiffs' suit, the district court dismissed the action. *Kennedy v. Hughes*, No. CIV 01-1183 WJ/LFG, slip op. at 5 (D.N.M. Mar. 27, 2002). In order to resolve the issue presented, we reassess the extent to which Congress created a private cause of action under ICRA. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I

Edward Kennedy, a member of the Blackfeet Indian Tribe, and his wife Catherine A. Singer, a member of the Santa Clara Pueblo (collectively, "plaintiffs"), both reside on the Santa Clara Pueblo reservation. In 1996, plaintiffs filed a suit in the Santa Clara Tribal Court against Chief Judge Silva of that court and fourteen Santa Clara Tribal Council ("Council") members, claiming that their civil rights were violated when Chief Judge Silva incarcerated Kennedy and seized property belonging to Singer.[1] Richard Hughes was

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] Judge Silva incarcerated Kennedy and seized Singer's property when Kennedy failed to pay two default judgments entered against him in lawsuits brought by plaintiffs who are not parties to the

retained by the Council to defend this suit. On September 11, 1997, Santa Clara Tribal Court Judge H. Paul Tsosie granted defendants' motion to dismiss the complaint. Plaintiffs then appealed to the Santa Clara Pueblo Tribal Court of Appeals, which reversed the tribal court's dismissal in 1998 and remanded for further proceedings.[2]

Central to the tribal appeal of plaintiffs' Tribal Court suit against Silva and the Tribal Council members was whether a waiver of the tribe's sovereign immunity for purposes of civil rights actions continued to be in effect. In 1981, the Council had enacted a Law and Order Code ("Code") that contained a waiver of immunity for civil rights actions. In December 1983, the Council repealed this waiver by resolution, reaffirming its immunity from suit and that of its members, officers, employees, and staff. In March 1985, however, the Council reenacted the 1981 Code, but, according to the Council, the reenactment was "subject to all intervening changes, including the repeal of [the waiver provision]." (Appellant's App. at 75.) Nonetheless, Hughes advised the Council following the remand of plaintiffs' suit that the status of the waiver was uncertain, and suggested a proposed resolution reaffirming the tribe's sovereign immunity in civil rights cases. This resolution was passed in November 1998 as Resolution No. 98-29.

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instant case.

[2] According to the parties, this action was still pending on remand to the Santa Clara Tribal Court as of August 2002 (the date defendants filed responsive briefing before this court).

Following the enactment of this resolution, the plaintiffs filed a new action in the Santa Clara Tribal Court against Hughes and all the members of the Council who had voted to adopt Resolution No. 98-29. In this action, the plaintiffs claimed that Resolution No. 98-29 violated their rights under the Santa Clara Pueblo Constitution and their rights under the U.S. Constitution as protected by ICRA. Judge Frank DeMolli, appointed as Tribal Judge pro tempore, granted defendants' motion to dismiss. Plaintiffs did not appeal this order.[3]

In October 2001, plaintiffs filed the present suit in federal district court against several tribal officials (collectively "Tribal Defendants") and Hughes. In this action, plaintiffs claimed that the Tribal Defendants and Hughes had violated their constitutional rights as protected by ICRA, 25 U.S.C. § 1302 ("No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."). Specifically, plaintiffs made the same argument they had raised in their second suit in tribal court, claiming that the enactment of Regulation No. 98-29 violated the Santa Clara Pueblo Constitution, the United States Constitution, and §

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[3] After Judge DeMolli dismissed plaintiffs' second case in tribal court, the Council concluded that the cost of maintaining a separate tribal court of appeals was not justified, and transferred appellate jurisdiction over decisions of the Tribal Court to the Southwest Intertribal Court of Appeals ("SWITCA"). While the attorney for Kennedy and Singer was aware of this transfer of appellate jurisdiction, Kennedy and Singer apparently did not pursue an appeal before SWITCA.

1302 of ICRA, insofar as it denied them due process and equal protection of the law. Plaintiffs sought compensatory and punitive damages as well as declaratory relief.

Hughes and the Tribal Defendants filed separate motions to dismiss, arguing, among other grounds, that § 1302 of ICRA does not create a cause of action for this claim in federal court. The district court dismissed the action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim or, in the alternative, for lack of subject matter jurisdiction. *Kennedy v. Hughes*, slip op. at 5. Plaintiffs appeal this decision.

II

A dismissal for lack of subject matter jurisdiction is reviewed de novo. *U.S. West, Inc. v. Tristani,* 182 F.3d 1202, 1206 (10th Cir. 1999). In reviewing a dismissal for failure to state a claim under Rule 12(b)(6), we accept all well-pleaded factual allegations in the complaint as true and view them in the light most favorable to the nonmoving party. *Sutton v. Utah State Sch. for the Deaf & Blind,* 173 F.3d 1226, 1236 (10th Cir. 1999). The legal sufficiency of a complaint is a question of law; therefore, a Rule 12(b)(6) dismissal is reviewed de novo. *Id.*

Because plaintiffs' federal suit in the instant case is based on § 1302 of ICRA, we consider as a threshold matter whether a private cause of action may be brought under that section. In *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 69, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978), the Supreme Court held that the only provision of ICRA that authorizes a private cause of action is § 1303, the habeas corpus provision. The

Court held that § 1302, the section under which plaintiffs bring the instant action, "does not impliedly authorize actions for declaratory or injunctive relief against either [a] tribe or its officers." *Id.* at 72. We recognized a limited exception to this rule in the case of *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes,* 623 F.2d 682 (10th Cir. 1980), and plaintiffs claim that their action falls under the *Dry Creek* exception to *Santa Clara*.

In *Dry Creek*, the plaintiffs were non-Indians involved in a land dispute with two Indian tribes. *Id.* at 683-84. Although we acknowledged *Santa Clara* as governing authority, we nonetheless noted that the *Dry Creek* plaintiffs had "no remedy within the tribal machinery nor with the tribal officials in whose election they cannot participate." *Id.* at 685. We accordingly distinguished *Santa Clara* on the grounds that *Santa Clara* involved "entirely an internal matter concerning tribal members" and that "the members of the Tribe who were seeking relief also had access to their own elected officials and their tribal machinery to settle the problem." *Id.*

We have held that our holding in *Dry Creek* must be interpreted narrowly to avoid conflict with the Supreme Court's decision in *Santa Clara. White v. Pueblo of San Juan,* 728 F.2d 1307, 1312 (10th Cir. 1984). In order for the Dry Creek exception to apply, "[a] plaintiff must demonstrate: the dispute involves a non-Indian party; a tribal forum is not available; and the dispute involves an issue falling outside internal tribal affairs." *Ordinance 59 Ass'n v. U.S. DOI Sec'y,* 163 F.3d 1150, 1156(10th Cir. 1998).[4]

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[4] Subsequent decisions have limited the Dry Creek exception to cases involving "particularly egregious allegations of personal

In the instant case, the district court concluded that plaintiffs had failed to satisfy the second two requirements for the *Dry Creek* exception to apply.[5] *Kennedy v. Hughes*, slip op. at 4-5. As to the existence of a tribal forum, the district court concluded that a tribal forum is available in this case, as plaintiffs have filed two actions before the Santa Clara Tribal Court, the second of which involved the same claim as in the instant federal case.

In this Court, plaintiffs assert that they "have demonstrated that no tribal forum is viable to hear and decide their claims." (Appellants' Br. at 9.) According to plaintiffs, "[a] pro tem judge appointed by the Tribal Defendants determined that Appellants' second complaint should be dismissed because the Santa Clara Tribal Defendants' actions were not subject to judicial review." (*Id.* at 6.)

This misrepresents the tribal court's decision. Judge Frank Demolli, appointed to hear plaintiffs' case in tribal court, expressly ruled that the court had "both subject matter and personal jurisdiction" over the case (Appellants' App. at 101), and rejected plaintiffs' claims on the merits under ICRA as well as the Constitution and Bylaws of the Santa Clara Pueblo. In an extensive written opinion relying on both

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restraint and deprivation of personal rights." *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation,* 673 F.2d 315, 319 n.4 (10th Cir. 1982); *Jicarilla Apache Tribe v. Andrus,* 687 F.2d 1324, 1346 (10th Cir. 1982).

[5] The district court did not reach the first requirement in light of its determination that the other two requirements were not met. *Kennedy v. Hughes*, slip op. at 4.

federal and tribal court precedent, Judge Demolli held that Santa Clara Pueblo tribal courts are available as forums for adjudication of civil rights claims under ICRA and other law, and that "any civil rights claim shall be reviewed using the background of tribal sovereignty and in the context of the Pueblo of Santa Clara's unique tribal law and custom." (*Id.* at 106.) Judge Demolli then proceeded to explain why plaintiffs' claims of due process, equal protection, and bill of attainder violations were deficient on the merits to state a claim on which relief may be granted. Plaintiffs did not appeal.[6]

The *Dry Creek* exception thus plainly does not apply. In *Dry Creek*, there was "no forum where the dispute can be resolved and the personal and property rights asserted by plaintiffs be considered." 623 F.2d at 684. Here, by contrast, the Santa Clara Pueblo has made its tribal courts available for vindication of such rights. This is precisely as contemplated by the Supreme Court: "Tribal forums are available to vindicate rights created by the ICRA . . . . Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez,* 436 U.S. at 65. Plaintiffs have taken advantage of that forum, not once but twice. They did not prevail on the merits, but that does not entitle them to take their claim to federal court.

In light of the availability of a tribal forum, we need not consider whether plaintiffs' case satisfies any of the other

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[6] See supra note 3.

elements of the *Dry Creek* exception. Because *Santa Clara* holds that there is no private cause of action under ICRA outside the habeas context and plaintiffs fall under no exception to this rule, the district court correctly dismissed this suit for lack of subject matter jurisdiction or failure to state a claim upon which relief may be granted.

III

The judgment of the district court is **AFFIRMED**.

ENTERED FOR THE COURT

/s/ _____
Carlos F. Lucero
Circuit Judge

APPENDIX D

SANTA CLARA INDIAN PUEBLO
Post Office Box 580
Espanola, New Mexico 87532
(505) 753-7326
(505) 753-7330

PUEBLO OF SANTA CLARA TRIBAL COUNCIL

RESOLUTION NO. 98-29

REAFFIRMING THE IMMUNITY OF THE PUEBLO AND OF ITS JUDGES AND COURT PERSONNEL FROM SUIT

WHEREAS, the Pueblo of Santa Clara is a federally recognized Indian Tribe having inherent powers of sovereignty and self-government, which powers are exercised by and through its Tribal Council pursuant to the Pueblo's Constitution; and

WHEREAS, by resolution dated December 9, 1981, the Tribal Council originally enacted the Santa Clara Pueblo Law and Order Code; and

WHEREAS, as originally enacted, that Code contained Section 60.4, entitled "Waiver of Immunity," by which the Tribal Council purported to waive the immunity of the Pueblo's "members, officers, employees and staff from suit in

matters relating to alleged violation of civil rights, but for no other purpose"; and

WHEREAS, by resolution adopted by the Tribal Council on December 13, 1983, the Tribal Council repealed Section 60.4 of the Code, and reaffirmed its immunity from suit and that of its members, officers, employees and staff; and

WHEREAS, by Resolution 3-07-85, enacted on March 25, 1985, the Pueblo reenacted the Law and Order Code as originally enacted in 1981, but subject to all intervening changes, including the repeal of Section 60.4, and the Code was thereafter approved by the Bureau of Indian Affairs; and

WHEREAS, a question has arisen whether the re-enactment of the Code in 1985 revived Section 60.4 and the waiver of tribal immunity from suit contained therein; and

WHEREAS, the Tribal Council has determined, and by this resolution expressly declares, that at no time since its repeal on December 7, 1983, has the previous Section 60.4 of the Santa Clara Code been in effect, and that ever since that date, the Pueblo, its officers and employees have enjoyed the full extent of immunity from suit accorded them under federal law and tribal law; and

WHEREAS, the Tribal Council further wishes to reaffirm the doctrine of judicial immunity, protecting the Pueblo's judges and other court officials and employees from suit for actions taken by them in their official capacities, as that doctrine is generally recognized in American law, which doctrine has applied to the courts of the Pueblo of Santa Clara since their establishment;

NOW, THEREFORE, BE IT RESOLVED by the Tribal Council of the Pueblo of Santa Clara, as follows:

1. The Tribal Council hereby reaffirms the action taken by the resolution adopted by the tribal Council on December 7, 1983, repealing Section 60.4 of the Tribal Code, and further affirms that that repealer has been in continuous effect ever since the date of its enactment, and that at no time since that date has Section 60.4 or any other waiver of the tribal sovereign immunity of the Pueblo of Santa Clara been in existence or in effect.

2. The Tribal Council further expressly recognizes that the doctrine of judicial immunity, applying to the judges of the Tribal Court and the Court of Appeals of the Pueblo and to other judicial officers and employees, as generally recognized in American law, has been in full force and effect ever since the creation of such courts, was never intended to be within the scope of the former Section 60.4 of the Tribal Code, and has never been waived, limited or abrogated by the Tribal Council in any respect.

Santa Clara Indian Pueblo Resolution No. 98-29

CERTIFICATION

I, the undersigned, as Governor of the Pueblo of Santa Clara, hereby certify that the Santa Clara Tribal Council, at a duly called meeting that was convened with proper notice and was held on the 10th day of November, 1998, at the Santa Clara Pueblo, New Mexico, a quorum being present, approved the foregoing Resolution with 10 members voting in favor, 0 opposed, 0 abstaining and 2 being absent.

/s/ _____
WALTER DASHENO, Governor

Attest:

/s/ _____
Tribal Secretary